Supreme Court, U.S.
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No. 04 367

In The
Supreme Court of the United States

EARL DeWAAL,

Petitioner,

v.

JOSEPH F. ALSTON, Superintendent,
Rainbow Bridge National Monument;
ROBERT G. STANTON, Director, National Park Service;
and the NATIONAL PARK SERVICE, an agency
of the U.S. Department of the Interior,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a National Park Service policy that requires all visitors to a national monument to be instructed that an area of the monument is a "sacred religious site" to some American Indians and that all visitors must show "respect" for that religion by not approaching that "sacred" area:

1. Constitutes government endorsement of a religious symbol in a public place that may be challenged by a visitor who either comes into unwelcome direct contact with that policy or changes his behavior because of it?

2. Constitutes government enforcement of religious orthodoxy that may be challenged by a visitor who feels compelled to adhere to that policy?

LIST OF PARTIES

Natural Arch and Bridge Association is a non-profit corporation organized under the laws of the State of Colorado; it has no parent or subsidiary corporations. Robert Moore, Harvey Leake, David Brandt-Ericson, Earl DeWaal, and Evelyn Johnson are all individuals and members of the Natural Arch and Bridge Association. All were plaintiffs before the U.S. District Court for the District of Utah. Only Earl DeWaal and Evelyn Johnson were plaintiffs before the U.S. Court of Appeals for the Tenth Circuit. Only Earl DeWaal filed a Petition for Rehearing *En Banc*. Earl DeWaal is the only Petitioner.

Respondents named in the caption are joined in their official capacities, and they, or their predecessors, were defendants before the U.S. District Court for the District of Utah and Appellees before the U.S. Court of Appeals for the Tenth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE WRIT	6
I. DIRECT CONFLICT EXISTS BETWEEN THE TENTH CIRCUIT'S DECISION AND THE RELIGIOUS SYMBOL JURISPRUDENCE OF THIS COURT AND THE COURTS OF APPEALS	6
A. This Court Has Held That Citizens Have Standing To Object When Governments Endorse Religious Symbols In Public Places	6
B. Five Of The Circuits Have Held That Citizens Have Standing to Object When Governments Endorse Religious Symbols In Public Places	6
C. Three Of The Circuits Have Held That Citizens Have Standing To Object When Governments Endorse Religious Symbols In Public Places Only After The Citizens Change Their Behavior	7

TABLE OF CONTENTS – Continued

Page

D. This Court Should Grant This Petition Because The Tenth Circuit's Decision Conflicts With The Decisions Of This Court And The Courts Of Appeals And Because Of The Now Ever-Widening Split Among The Courts Of Appeals 9

1. Mr. DeWaal has standing to challenge the NPS's endorsement of a religious symbol at RBNM pursuant to the decisions of this Court and five of the Courts of Appeals 9

2. Mr. DeWaal has standing to challenge the NPS's endorsement of a religious symbol at RBNM pursuant to the decisions of a minority of the Courts of Appeals, which represent an ever-widening split 11

a. This Court should grant this petition given the failure of the Tenth Circuit to accord standing to Mr. DeWaal, who changed his behavior in the face of the NPS's policy 11

b. This Court should grant this petition to resolve the ever-widening split of the Courts of Appeals regarding standing to challenge government endorsement of religious symbols in public places 12

TABLE OF CONTENTS – Continued

Page

II. A DIRECT CONFLICT EXISTS BETWEEN THE TENTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF GOVERNMENTS' DEMAND THAT CITIZENS "RESPECT" THE RELIGIOUS ORTHODOXY OF OTHERS 13

A. When Individuals Are Coerced By Governments Into Following The Tenets Of Religion, They Have Standing Under The Establishment Clause 13

B. When Governments Demand Adherence To Religious Orthodoxy By Exerting Social Pressure, Those Actions Constitute Unconstitutional Coercion 16

III. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE THAT REQUIRES RESOLUTION BY THIS COURT 18

A. Whether Federal Land May Be Closed To The Public Because It Is Considered "Sacred," Affects A Vast Area Of The Western United States 18

B. The Decision Of The Tenth Circuit, By Allowing The Federal Government To Deny Access To Federal Lands Based on Religion, Is In Direct Conflict With The Controlling Decision Of This Court 20

CONCLUSION 22

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Abbington v. Schempp, 374 U.S. 203 (1963) 14

ACLU of Georgia v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983) 7

ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) 8, 11

Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970) 7

Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) 7

Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) 21, 22

Baggett v. Bullitt, 377 U.S. 360 (1964) 14

Baird v. State Bar of Arizona, 401 U.S. 1 (1971) 14

Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999) 8, 11, 13

Buono v. Norton, 371 F.3d 543 (9th Cir. 2004) 9, 11, 13

City of Edmond v. Robinson, 517 U.S. 1201 (1996) 12, 13

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 6

Engel v. Vitale, 370 U.S. 421 (1962) 14, 16, 17

Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989) 7, 8, 10, 12

Freedom From Religion v. Zielke, 845 F.2d 1463 (7th Cir. 1988) 8, 11, 12

Hawley v. City of Cleveland, 773 F.2d 736 (6th Cir. 1985) 6, 12

TABLE OF AUTHORITIES – Continued

Page

Herndon v. Chapel Hill-Carrboro City Bd. Of Educ., 89 F.3d 174 (4th Cir. 1996) 15

Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) 15

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 14

Laird v. Tatum, 408 U.S. 1 (1992) 14

Lamont v. Postmaster General, 381 U.S. 301 (1965) 14

Lee v. Weisman, 505 U.S. 577 (1992) 13, 14, 16

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 20, 21, 22

Natural Arch and Bridge Ass'n, et al. v. Alston, et al., 209 F.Supp.2d 1207 (D. Utah 2002) .....*passim*

Natural Arch and Bridge Ass'n, et al. v. Alston, et al., 98 Fed. Appx. 711 (10th Cir. March 23, 2004) .....*passim*

Sable Communications of California, Inc. v. F.C.C., 827 F.2d 640 (9th Cir. 1987) 15

Sable Communications of California, Inc. v. Pacific Tel. & Tel. Co., 890 F.2d 184 (9th Cir. 1989) 15

Saladin v. City of Milledgeville, 812 F.2d 687 (11th Cir. 1987) 6, 12

Suhre v. Haywood County, 131 F.3d 1083 (4th Cir. 1997) 6, 9

Torcaso v. Watkins, 367 U.S. 488 (1961) 14

Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc., et al., 454 U.S. 464 (1982) 12

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943) 14

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

The First Amendment 1, 15, 21

STATUTES

28 U.S.C. § 1254 1

OTHER AUTHORITIES

Federal Land Law Review Commission Report 18

Bureau of Land Management, Department of the Interior, Public Land Statistics, 1998. Table 1-3 18

Santa Fe Ski Area Master Development Plan. Final Environmental Assessment of November, 1995 at IV – 54 19

Historic Preservation Plan for Medicine Wheel National Historic Landmark and Vicinity. United States Forest Service. September 1996, Part III, statement of "Purpose" 20

OPINIONS BELOW

The opinion of the Tenth Circuit from which review is sought is reported at 98 Fed.Appx. 711 (10th Cir. March 23, 2004) and is reproduced at App. 1-12. The opinion of the U.S. District Court for the District of Utah is reported at 209 F.Supp.2d 1207 (D. Utah 2002) and is reproduced at App. 13-50.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered on March 23, 2004, by the U.S. Court of Appeals for the Tenth Circuit. A Petition for Rehearing *En Banc* was denied on June 15, 2004.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

STATEMENT OF THE CASE

On March 3, 2000, the Natural Arch and Bridge Society, David Brandt-Ericson, Harvey Leake, Evelyn Johnson, Robert Moore, and Earl DeWaal brought suit in the United States District Court for the District of Utah against Joseph F. Alston, Robert G. Stanton, and the National Park Service ("NPS") challenging the 1993 General Management Plan ("GMP") for Rainbow Bridge National Monument ("RBNM"), which contains NPS policies and practices that prevent visitors from approaching or walking under Rainbow Bridge unless those visitors are American Indians or are engaging in American Indian religious ceremonies. App. 2-3.

On April 5, 2002, the District Court denied Natural Arch and Bridge Society's motion for summary judgment and granted Defendants' motion to dismiss. App. 50. On July 1, 2002, the District Court entered a Memorandum Opinion & Order (corrected text), holding: (1) Mr. DeWaal has standing as to his 1998 visit to RBNM, but has no standing as to his 1999 visit to RBNM; (2) no other plaintiff has standing; (3) the 1993 GMP does not violate the Establishment Clause. *Id.*

On June 17, 2002, Earl DeWaal and Evelyn Johnson filed their Notice of Appeal. On September 15, 2003, after briefing, oral arguments were held before the U.S. Court of Appeals for the Tenth Circuit. Mr. DeWaal and Ms. Johnson argued: (1) Mr. DeWaal and Ms. Johnson have standing to raise an Establishment Clause claim; and (2) the 1993 GMP constitutes NPS endorsement of religion.

On March 23, 2004, the Tenth Circuit held that Mr. DeWaal and Ms. Johnson lacked standing to challenge the 1993 GMP. App. 12. As to Mr. DeWaal, the Tenth Circuit

reversed the judgment of the District Court and held that Mr. DeWaal did not have standing as to his 1998 visit to RBNM; the Tenth Circuit upheld the District Court's ruling that Mr. DeWaal did not have standing as to his 1999 visit to RBNM. *Id.* As to Ms. Johnson, the Tenth Circuit upheld the District Court's ruling that Ms. Johnson lacked standing. *Id.*

On May 10, 2004, Mr. DeWaal filed a Petition for Rehearing *En Banc*. On May 17, 2004, the Tenth Circuit ordered the Appellees to respond, App. 51-52, which they did on May 27, 2004. On June 15, 2004, the Tenth Circuit denied Mr. DeWaal's Petition. App. 53-54. Mr. DeWaal's Petition for *Writ of Certiorari* follows.

STATEMENT OF FACTS

In June 1993, "as a result of consultation with American Indian groups concerning the traditional and religious significance of [RBNM]," the NPS adopted the 1993 GMP implementing a variety of use restrictions and other new policies at RBNM. App. 5. Central to and part of the 1993 GMP is the Interpretive Prospectus, which, according to the NPS, is designed to provide "a framework for a meaningful visitor experience to [RBNM] through park interpretation provided by [NPS] and concessionaire personnel." App. 21. In it, the NPS affirms that "[p]eople walking beneath the bridge is [sic] particularly offensive to the Navajo people and other American Indian tribal members." App. 15. "Inappropriate visitor use of [RBNM] creates an atmosphere that detracts . . . from the *American Indian view* of how [RBNM] should be treated. . . ."

App. 24. As a result, "the *religious and sacred significance* of the area to various American Indian tribes has become a *strong factor in determining the way [RBNM] is managed*." (Emphasis added). App. 24-25.

Pursuant to the 1993 GMP, an official sign was placed on the far side of the Viewing Area, facing visitors as they view Rainbow Bridge, which reads:

> To Native American tribes/nations Rainbow Bridge is a sacred religious site. In respect of these long-standing beliefs, we request your voluntary compliance in not approaching or walking under Rainbow Bridge.

App. 5. The NPS admits that the sign is meant to communicate the spiritual significance of Rainbow Bridge to American Indians. App. 5, 23-25. The NPS has placed another official NPS sign along the trail leading to Rainbow Bridge attesting to the "sacred" and "religious" nature of Rainbow Bridge and formally requesting "compliance" with the NPS's policy against approaching or walking under Rainbow Bridge. App. 24-25.

At the Viewing Area, official, uniformed NPS Interpreter/Rangers present "interpretive" speeches to RBNM visitors. According to one uniformed NPS Interpreter/Ranger, these speeches recognize "the spiritual side of Rainbow Bridge" and the "religious context of [Rainbow Bridge]." Video of NPS Interpreter Mike Dedman. That same uniformed NPS Supervisor and Interpreter/Ranger, speaking to a group of RBNM visitors, likened Rainbow Bridge to a "church, cathedral, or religious shrine," saying that it is a "sacred entity." *Id.*

In July or August of 1998, Mr. DeWaal traveled to RBNM with his wife, Vickie, and several of their children. App. 7, 30-31. A uniformed NPS Interpreter/Ranger requested that Mr. DeWaal and his family not approach or walk beneath Rainbow Bridge. *Id.* Although Mr. DeWaal and his family wanted to walk beneath Rainbow Bridge, Mr. DeWaal and his family "felt compelled" by the actions and authority of the NPS Interpreter/Ranger and did not approach Rainbow Bridge. *Id.*

On July 18, 1999, Mr. DeWaal, his wife, and several of their children again traveled to RBNM. App. 6-7, 33. Mr. DeWaal asked a NPS Interpreter/Ranger if he, Mr. DeWaal, were allowed to approach or walk beneath Rainbow Bridge; he was told that he was not allowed to do so. *Id.* Eventually, the NPS Supervisor of the NPS Interpreter/Ranger told Mr. DeWaal that he could approach Rainbow Bridge but that he would be issued a citation if he ventured beyond the Viewing Area. *Id.* Although Mr. DeWaal wanted to walk beneath Rainbow Bridge, he "felt compelled" not to do so, based on the NPS Supervisor's threat to cite Mr. DeWaal if he did so. *Id.*

Believing the policies and practices of the NPS to be a violation of the Establishment Clause requirement that the federal government maintain neutrality concerning matters of religion, Mr. DeWaal filed this action. App. 2.

REASONS FOR GRANTING THE WRIT

I. A DIRECT CONFLICT EXISTS BETWEEN THE TENTH CIRCUIT'S DECISION AND THE RELIGIOUS SYMBOL JURISPRUDENCE OF THIS COURT AND THE COURTS OF APPEALS.

A. This Court Has Held That Citizens Have Standing To Object When Governments Endorse Religious Symbols In Public Places.

Establishment Clause plaintiffs have standing when governments endorse religious symbols in public places. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), this Court held that local residents who objected to a crèche being displayed on city and county property had standing because the crèche conveyed a clearly religious message to the local residents. *Id.* at 598-99, 601, 620.

B. Five Of The Circuits Have Held That Citizens Have Standing To Object When Governments Endorse Religious Symbols In Public Places.

The Fourth, Sixth, Tenth, Eleventh, and District of Columbia Circuits recognize Establishment Clause standing based solely on an allegation of direct personal contact with the offensive government embrace of a religious symbol in a public place. *See, Suhre v. Haywood County,* 131 F.3d 1083 (4th Cir. 1997) (finding that the injury giving an individual standing to bring an Establishment Clause claim is "unwelcome direct contact with a religious display that appears to be endorsed by the state"); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (finding individual's visit to city airport conveyed standing to challenge city's lease of airport space for use as a chapel); *Saladin v. City of*

Milledgeville, 812 F.2d 687 (11th Cir. 1987) (recognizing standing because the challengers of the government's action were confronted directly by presence of word "Christianity" on city seal); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (recognizing standing to bring Establishment Clause claim based on the individuals' state residency and their use of a state park); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (finding residents' allegation that a local public park was being devoted to religious use was sufficient to confer standing).

The Tenth Circuit has agreed with the majority of the Courts of Appeals, by recognizing an individual's standing under the Establishment Clause where that person alleged direct personal contact with government's unconstitutional endorsement of a religious symbol in a public place. *See*, *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (finding an individual had standing to challenge the official logo of the City of St. George, Utah, which had a picture of a Mormon Temple because he had "direct, personal contact" and was "greatly offend[ed], intimidate[d] and affect[ed]" by it); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973) (finding individuals had standing to challenge the existence of a granite monument of the Ten Commandments in city courthouse because they were city residents).

C. Three Of The Circuits Have Held That Citizens Have Standing To Object When Governments Endorse Religious Symbols In Public Places Only After The Citizens Change Their Behavior.

The Seventh Circuit first created a split among the Courts of Appeals as to whether an individual who challenges

government endorsement of a religious symbol in a public place must allege, not only that the government action directly affected him, but also that it cause him to alter his behavior. *See*, *Freedom From Religion v. Zielke*, 845 F.2d 1463 (7th Cir. 1988) (residents had no standing to challenge Ten Commandments display in city park because they did not allege a change in behavior); *ACLU v. City of St. Charles*, 794 F.2d 265, 269 (7th Cir. 1986) (finding plaintiff had standing to challenge a display of a lighted cross on public property not because the display deeply offended her, but because "she detours from her accustomed route to avoid the cross when it is lit.")

With it's decision in *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), the Tenth Circuit appears to have joined with the Seventh Circuit in holding that an individual who challenges government endorsement of a religious symbol in a public place must demonstrate that he has altered his behavior in response to that unconstitutional action.[1] In *Bear Lodge*, the Tenth Circuit held that the individually named recreation climbers had no standing to challenge the federal government's abandonment of neutrality at Devils Tower in Wyoming because those climbers continued to climb Devils Tower despite the religiously-motivated June climbing ban. *Id.* at 821-22.

[1] Within the Tenth Circuit, there is also a split. *Compare Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) with *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999).

The Ninth Circuit has determined recently that an individual must alter his behavior in order to have standing to challenge the federal government's endorsement of a religious symbol on public land. In *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), visitors challenged the presence of a Latin cross in a national preserve operated by the NPS. One of the visitors averred that he would avoid the area as long as the cross remained in place and, therefore, could not freely use the area of the preserve around the cross because of the government's allegedly unconstitutional actions. *Id.* at 547. The Ninth Circuit held "that the inability to use public land unreservedly suffices as injury-in-fact." *Id.* Therefore, it appears that the Ninth Circuit has joined the Seventh and Tenth Circuits in holding that an individual who seeks to challenge government endorsement of a religious symbol in a public place must change his behavior to have standing to do so.

D. This Court Should Grant This Petition Because The Tenth Circuit's Decision Conflicts With The Decisions Of This Court And The Courts Of Appeals And Because Of The Now Ever-Widening Split Among The Courts Of Appeals.

1. Mr. DeWaal has standing to challenge the NPS's endorsement of a religious symbol at RBNM pursuant to the decisions of this Court and five of the Courts of Appeals.

During both his 1998 and 1999 visits to RBNM, Mr. DeWaal came into "unwelcome direct contact," *Suhre* 131 F.3d at 1088, with the NPS's policy that a portion of RBNM, specifically Rainbow Bridge, is a "sacred religious

site," that is, it is god incarnate. App. 5. Under the holdings of this Court and the five other Courts of Appeals, these facts alone entitle Mr. DeWaal to standing to challenge the constitutionality of the NPS's policy at RBNM. *See, supra,* at 6-7. Moreover, under Tenth Circuit precedent, specifically *Foremaster*, Mr. DeWaal has standing to challenge the NPS's policy because, like Mr. Foremaster, Mr. DeWaal had "direct, personal contact" with the treatment of Rainbow Bridge as god incarnate "as a part of [] official" NPS policy. *Foremaster,* 882 F.2d at 1490-91. Furthermore, like Mr. Foremaster, Mr. DeWaal was "intimidate[d] and affect[ed]" by the NPS's policy when he was confronted directly by the NPS's policy during his 1998 and 1999 visits to RBNM. *Id.*, App. 6-7. Finally, like Mr. Foremaster, Mr. DeWaal was "greatly offend[ed]" by the NPS's policy in what he believed to be the unconstitutional endorsement of religion in a national park open to the public. *Foremaster*, 882 F.2d at 1490-91. Nonetheless, the Tenth Circuit, in the instant case, held that Mr. DeWaal did not have standing. App. 10.

Because the decision of the Tenth Circuit is in direct conflict with the decisions of this Court and the five other Courts of Appeals regarding Establishment Clause standing when governments endorse religious symbols in public places, this Court should grant this Petition.

2. Mr. DeWaal has standing to challenge the NPS's endorsement of a religious symbol at RBNM pursuant to the decisions of a minority of the Courts of Appeals, which represent an ever-widening split.

a. This Court should grant this petition given the failure of the Tenth Circuit to accord standing to Mr. DeWaal, who changed his behavior in the face of the NPS's policy.

Even if, as it appears, the Tenth Circuit, with its decision in *Bear Lodge*, has embraced the approach of the Seventh Circuit by requiring that citizens who object to government endorsement of a religious symbol in a public place must change their behavior to have standing to do so, Mr. DeWaal has standing to challenge the NPS's policy at RBNM. The Tenth Circuit acknowledged that Mr. DeWaal had changed his behavior; that is, although he wished to walk beneath Rainbow Bridge, he did not do so. App. 8. In fact, the Tenth Circuit noted that Mr. DeWaal "felt compelled" not to walk beneath Rainbow Bridge. *Id.* As a result, pursuant to the rulings of the Seventh and Ninth Circuit, Mr. DeWaal has standing to challenge the NPS's policies.[2] Nonetheless, the Tenth Circuit, in the instant case, held that Mr. DeWaal did not have standing. App. 10.

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[2] It is irrelevant, for the purposes of religious symbol jurisprudence, whether Mr. DeWaal changed his behavior "voluntarily" or "involuntarily." None of the offended citizens in *Zielke*, *City of St. Charles*, and *Buono* was "coerced" to change his behavior but did so simply due to the presence of a government-endorsed religious symbol on public land.

Because the decision of the Tenth Circuit is in direct conflict with the decisions of the minority of Courts of Appeals regarding Establishment Clause standing when governments endorse religious symbols in public places, this Court should grant this Petition.

b. This Court should grant this petition to resolve the ever-widening split of the Courts of Appeals regarding standing to challenge government endorsement of religious symbols in public places.

This Court has previously declined the opportunity to address the ever-widening split among the Courts of Appeals as to standing in religious symbol cases. In *City of Edmond v. Robinson*, 517 U.S. 1201 (1996), Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented from this Court's decision not to grant *certiorari* to consider the standing of city residents to challenge the constitutionality of a Latin cross on the City's official seal. "The *Foremaster* court acknowledged that there was a disagreement among the Courts of Appeals about whether *Valley Forge* allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs." *Id.* at 1202. *See also*, *Freedom From Religion v. Zielke*, 845 F.2d 1463 (7th Cir. 1988) (finding this allegation insufficient); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (finding it sufficient). Therefore, "[b]ecause there are serious arguments on both sides of this question, the Courts of Appeals have divided on the issue, and the issue determines the reach of federal courts'

opportunity to consider it." *City of Edmond*, 517 U.S. at 1203.

Subsequent to this Court's decision not to grant *certiorari* in *City of Edmond*, yet another Court of Appeals, in addition to the Tenth Circuit in its apparent embrace of the Seventh Circuit's approach in *Bear Lodge*, has joined the split among the circuits on this issue. *Buono*, 371 F.3d 543. Because the Tenth Circuit's decision exacerbates the ever-widening split among the Courts of Appeals as to this critical standing issue in Establishment Clause religious symbol cases, this Court should grant this Petition.

II. A DIRECT CONFLICT EXISTS BETWEEN THE TENTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF GOVERNMENTS' DEMAND THAT CITIZENS "RESPECT" THE RELIGIOUS ORTHODOXY OF OTHERS.

A. When Individuals Are Coerced By Governments Into Following The Tenets Of Religion, They Have Standing Under The Establishment Clause.

This Court has made clear that coercive government practices violate the Establishment Clause. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (finding "what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices [of invocations and benedictions in

the form of prayer at graduation ceremonies for public schools] may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."); *Abbington v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (finding that requiring school children to listen to readings from the Bible was coercion and can be a basis of an Establishment Clause claim). *Engel v. Vitale*, 370 U.S. 421 (1962).

This Court has struck down several other coercive government programs aimed at promoting "respectful" behavior or demanding demonstrations of religious belief. *See, West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (finding compulsory flag salute exercise was an unconstitutional coercion of belief); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (finding public employment may not be conditioned upon one's willingness to subscribe to particular religious principles or to any religious belief at all).

This Court has suggested that coercion under the Establishment Clause "may not be limited to the context of schools." *Lee,* 505 U.S. at 592. In other settings, this Court has found clear constitutional violations as a result of "the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1992); *see also, Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (freedom of association); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (freedom of speech); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (freedom of speech); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (freedom of association).

All other Courts of Appeals are in accord. "The degree of involuntariness needed to invoke the Establishment Clause is exceedingly low, and includes subtle and indirect pressure." *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174, 180 (4th Cir. 1996); *see also, Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996) (finding "a coercion-based claim indisputably raises an Establishment Clause question"). Similarly, the Ninth Circuit held that the government's mere threat to enforce a regulation was sufficient grounds for a party to challenge the regulation as a violation of First Amendment rights. *See, Sable Communications of California, Inc. v. F.C.C.*, 827 F.2d 640 (9th Cir. 1987) (finding plaintiff's fears that the government would enforce a regulation against him were not "too speculative to warrant the invocation of federal jurisdiction" where the FCC threatened to enforce that regulation); *see also, Sable Communications of California, Inc. v. Pacific Tel. & Tel. Co.*, 890 F.2d 184, 188 (9th Cir. 1989) (finding the government's "attempted use of the rule as the . . . instrument of compulsion necessarily gives appellees standing to challenge the constitutional validity of the rule."). The government's coercive pressure deprives the individual of his or her ability to act on his or her own volition. Therefore, notwithstanding an individual's apparent "voluntary" compliance with state-sponsored religious orthodoxy, the individual retains the right to challenge the constitutionality of the government's endorsement of that orthodoxy.

Application of the decisions of this Court and every other Court of Appeals to the NPS's policy at RBNM makes it clear that Mr. DeWaal was coerced and has standing to challenge the NPS's policy that Mr. DeWaal adhere to the religious orthodoxy of some American

Indians, which holds that Rainbow Bridge is god incarnate, and that Mr. DeWaal "respect" that orthodoxy by not walking near or underneath Rainbow Bridge. According to the Tenth Circuit, Mr. DeWaal "felt compelled" not to approach Rainbow Bridge. App. 6-8. Therefore, Mr. DeWaal has standing to challenge the NPS's policy.

Because the Tenth Circuit's holding is in direct conflict with the decisions of this Court and every other Court of Appeals as to what constitutes coercion to enforce religious orthodoxy in violation of the Establishment Clause, this Court should grant this Petition.

B. When Governments Demand Adherence To Religious Orthodoxy By Exerting Social Pressure, Those Actions Constitute Unconstitutional Coercion.

This Court has made clear that coercion, under the Establishment Clause, includes imposition of social pressure. *Lee*, 505 U.S. at 578, 592 (finding that the government "may no more use social pressure to enforce orthodoxy than it may use direct means."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (finding that the government violates the Establishment Clause when it applies its "power, prestige and financial support" to a particular religious belief because "the indirect coercive pressure . . . to conform . . . is plain."). As noted above, *supra* at 15, the Courts of Appeals are in accord.

The NPS not only directly applied its "power . . . and financial support" to compel compliance with "the do not approach or walk underneath Rainbow Bridge" policy, it engaged in an aggressive nationwide campaign to apply its "prestige" so as to impose social and public pressures on

visitors to RBNM, including Mr. DeWaal, to "show respect" for the religious beliefs of American Indians. As a result of this ongoing and formal "partnership" between the NPS and American Indians, the following new policies and practices were implemented at RBNM: (i) an official visitor viewing area ("Viewing Area") was created at the RBNM; (ii) the Department of the Interior Solicitor and American Indians jointly developed the language for several official NPS signs at the viewing area; (iii) a new NPS "Rainbow Bridge Official Map and Guide" was printed and distributed adding new text "interpreting the sacred significance of Rainbow Bridge;" (iv) the Official Map and Guide was translated into German and French and made available on-site and on boat tours; (v) the NPS implemented new tour boat schedules "to minimize crowds" at RBNM; (vi) the NPS hired American Indians to fill four of five seasonal maintenance positions and three of five NPS Interpreter/Ranger positions at RBNM; and (vii) the NPS began fabricating new RBNM wayside exhibits "interpreting the site's sacred significance." App. 21-23.

Through all of these means, the NPS has communicated its message that the NPS expects visitors at RBNM to show "respect" for American Indian religion by not approaching or walking underneath Rainbow Bridge, and that anyone who does not show "respect" is mean-spirited and self-indulgent. Thus, the NPS applied its "prestige" in order to place "indirect coercive pressure [on visitors to RBNM] to conform" to the religious orthodoxy of respecting the "sacredness" of Rainbow Bridge. *Engel,* 370 U.S. at 431. Nonetheless, the Tenth Circuit failed to hold that this imposition of coercive social pressure is the type of government action that gives rise to standing to bring an

Establishment Clause challenge, contrary to the holdings of this Court and the Courts of Appeals.

Because the Tenth Circuit's decision is in direct conflict with the decisions of this Court and of the Courts of Appeals, this Court should grant this Petition.

III. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE THAT REQUIRES RESOLUTION BY THIS COURT.

A. Whether Federal Land May Be Closed To The Public Because It Is Considered "Sacred," Affects A Vast Area Of The Western United States.

One-third of the land in this country is owned and managed by the federal government.[3] Much of that land is in the West. In many western states, the federal government is, if not the owner of a majority of the land, the largest single landowner. For example, the federal government owns sixty-four percent of the State of Utah.[4] The amount of land owned by the federal government in the other nine western states ranges from a low of 28 percent (Colorado) to a high of 82 percent (Nevada). *Id.* Moreover, within these states, the federal government is the overwhelming majority landowner in many, if not most, rural counties.

Because American Indians once populated virtually all of what is today the United States, nearly all of the

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[3] "One Third of the Nation: the Federal Land Law Review Commission Report."

[4] Bureau of Land Management, Department of the Interior, Public Land Statistics, 1998. Table 1-3.

land owned by the federal government was at one time home to American Indians. In addition, because the religion of those Indians was often land based, virtually any portion of the land owned by the federal government could be considered "sacred" to their descendents.

Western states, and particularly rural western counties, use and rely upon land owned and managed by the federal government for recreation and economic activity. In fact, land owned by the United States provides the economic mainstay of the overwhelming majority of rural western counties, supporting as it does such diverse activities as tourism, forestry, ranching, mining, and oil and gas exploration and development. Without the access to lands owned by the United States that federal law permits and has permitted for more than a century, many rural western counties would be devastated.

Thus, if the action taken by the United States here, that is, closure of federal land to recreational activity because of the beliefs of some American Indians, is upheld, then the consequences to westerners, particularly rural westerners, would be significant and far reaching. In fact, the federal government has taken and is continuing to take such action in various locations throughout the western states. For example, in the Santa Fe National Forest in New Mexico, the federal government rejected a long-standing plan to expand a ski area because the federal land is considered "sacred."[5] In the Big Horn National Forest in Wyoming, all of Medicine Mountain has been set aside for management as a "sacred site," thus

[5] Santa Fe Ski Area Master Development Plan. Final Environmental Assessment of November, 1995 at IV – 54.

ending all forestry activity upon which a nearby town relies for jobs and for the preservation of a health forest.[6]

Because of the exceptional importance of this matter to westerners, and particularly rural westerners, this Court should grant this Petition.

B. The Decision Of The Tenth Circuit, By Allowing The Federal Government To Deny Access To Federal Lands Based On Religion, Is In Direct Conflict With The Controlling Decision Of This Court.

This Court has made it clear that federal land may not be closed to the public for the purposes of religious activity. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *Lyng* concerned a challenge to the Forest Service's decision to allow timber harvesting and road construction in an area of the Six Rivers National Forest considered sacred by several American Indian tribes. This Court upheld the Forest Service's decision, finding "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452. This Court held that the Constitution "does not provide a principle that could justify upholding respondents' legal claim." *Id.* at 451-52.

The *Lyng* decision made clear that the demands for privacy by American Indians cannot justify the government's closure of public lands, even temporarily: "Nothing

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[6] Historic Preservation Plan for Medicine Wheel National Historic Landmark and Vicinity. United States Forest Service. September 1996, Part III, statement of "Purpose."

in the principle for which [the American Indians] contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands." *Id.* at 452-53. "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its own right to use what is, after all, *its* land." *Id.* at 453. Similarly, in this case, the federal government may not "exclude human activity," in the form of approaching or walking underneath Rainbow Bridge, simply because certain American Indians consider Rainbow Bridge "sacred." Just like the forest involved in *Lyng*, RBNM is public land and the public may not be denied its "right to use" the land. *Id.*

In *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980), the Tenth Circuit held that the public could not be excluded from RBNM even though the Navajo consider the site sacred: "[W]hat plaintiffs seek . . . is affirmative action by the government which implicates the Establishment Clause of the First Amendment." *Badoni*, 638 U.S. at 178. "Issuance of regulations to exclude tourists completely from [RBNM] for the avowed purpose of aiding [American Indians'] conduct of religious ceremonies would seem a clear violation of the Establishment Clause." *Id.* at 179. "The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . ." *Id.* "We do not believe [American Indians] have a constitutional right to have tourists visiting [Rainbow] Bridge act "in a respectful and appreciative manner. Were it otherwise, [RBNM] would become a government-managed religious shrine." *Id.*

Because the decision of the Tenth Circuit is in direct conflict with the clear principles set forth in *Lyng* and *Badoni,* this Court should grant this Petition.

CONCLUSION

For all of the above reasons, this Court must grant this Petition.

Respectfully submitted,

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APPENDIX INDEX

		Page
March 23, 2004	Decision	App. 1
July 2, 2002	Decision	App. 13
May 17, 2004	Order Directing Appellees to Respond to Appellants' Petition for Rehearing *En Banc*	App. 51
June 15, 2004	Order Denying Petition for Rehearing *En Banc*	App. 53

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NATURAL ARCH AND BRIDGE SOCIETY, a Colorado non-profit corporation; DAVID BRANDT-ERICSON, an individual; HARVEY LEAKE, an individual; EVELYN JOHNSON, an individual; EARL DEWAAL, an individual; ROBERT MOORE, an individual,

Plaintiffs-Appellants,

v.

JOSEPH F. ALSTON, Superintendent, Rainbow Bridge National Monument; ROBERT G. STANTON, Director, National Park Service; NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior,

Defendants-Appellees.

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH AMERICA, and NATIONAL TRUST FOR HISTORIC PRESERVATION,

Amici Curiae.

No. 02-4099
(D.C. No.
2:00-CV-191-J)
(Utah)

ORDER AND JUDGMENT*
(Filed Mar. 23, 2004)

Before **LUCERO**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **O'BRIEN**, Circuit Judge.

By a complaint filed on March 3, 2000, the Natural Arch and Bridge Society, a Colorado non-profit corporation; and David Brandt-Ericson, Harvey Leake, Evelyn Johnson, Earl DeWaal, and Robert Moore, as individuals, brought suit in the United States District Court for the District of Utah against Joseph F. Alston, the Superintendent of the Rainbow Bridge National Monument, Robert G. Stanton, the Director of the National Park Service, and the National Park Service ("Park Service"), an agency of the U.S. Department of the Interior. The gist of the complaint was as follows:

> This case concerns the management policies and practices of Defendant National Park Service (Park Service) that prevent visitors to the Rainbow Bridge National Monument (Rainbow Bridge or Monument) from approaching the rock span that is the central attraction of the Monument unless those visitors are Native Americans or are engaging in Native American religious ceremonies.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The first cause of action was based on an alleged violation of the Establishment Clause in the First Amendment of the United States Constitution. A second, and last, cause of action was based on an alleged violation of "the Equal Protection component of the Fifth Amendment of the United States Constitution." Jurisdiction was based on 28 U.S.C. § 1331. On May 15, 2000, the defendants filed an answer to the complaint.

After discovery by both sides, the plaintiffs filed a motion for summary judgment and the defendants filed a motion to dismiss. The two motions were consolidated for hearing. On April 5, 2002, the district court entered a memorandum opinion and order in which it denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss. *Natural Arch and Bridge Society v. Alston,* 209 F.Supp. 2d 1207 (D.Utah 2002). In line therewith, on April 9, 2002, the district court entered the following judgment:

> IT IS ORDERED AND ADJUDGED
>
> that the claims of plaintiffs Moore, Brandt-Ericson, Leake, Johnson and National Arch and Bridge Society are dismissed for lack of standing; plaintiff DeWaal's equal protection claim is dismissed for failure to state a claim upon which relief may be granted. Judgment is entered in the favor of the defendants on plaintiff DeWaal's challenge to the 1993 GMP and Interpretive Prospectus under the Administrative Procedures Act. Plaintiff DeWaal's claim of violation of the First Amendment by employees of the National Park Service is dismissed for failure to join the proper parties as defendants.

On June 5, 2002, the plaintiffs, pursuant to 28 U.S.C. § 1291, filed a notice of appeal from the district court's judgment entered on April 9, 2002. On July 1, 2002, the district court entered a second memorandum opinion and order, which it labeled as being a "Corrective Text." That order was "entered *nunc pro tunc* to 5th of April, 2002." *Natural Arch v. Alston,* No. 2:00-C-0191J, at # 54 (D.Utah July 1, 2002).

As we understand it, the only persons named as plaintiffs in the complaint filed in the district court who are pursuing this appeal, are Ms. Evelyn Johnson and Mr. Earl DeWaal. Accordingly, we are not here concerned, as such, with the other plaintiffs named in the complaint filed in the district court, i.e., National Arch and Bridge Society, Robert Moore, David Brandt-Ericson, and Harvey Leake. Further, as we understand it, we are not here concerned, as such, with the second cause of action in the complaint filed in the district court, i.e., the cause which was based on the "equal protection" component of the "due process" clause of the Fifth Amendment. Thus, we are only concerned here with Johnson's and DeWaal's first cause of action, which was a challenge to the Park Service's policies and practices based on the Establishment Clause of the First Amendment. As to Johnson, the district court held that Johnson had no standing to assert a claim based on an alleged violation of the Establishment Clause. However, as to DeWaal, the district court held that while DeWaal did have standing to assert a claim based on the Establishment Clause, he had failed to state a claim upon which relief could be granted, and his first cause of action was subject to a motion to dismiss. In line therewith, the district court denied plaintiffs' motion for summary judgment.

As indicated at the outset, Johnson and DeWaal challenge the policies and practices of the Park Service as such related to the Rainbow Bridge National Monument in Southern Utah, claiming that "the challenged policy violates the Establishment Clause of the First Amendment because that policy has the purpose and effect of endorsing American Indian religion and results in excessive entanglement of the federal government in religious matters." In the complaint, the plaintiffs in challenging the practices and policies of the Park Service alleged the following:

> Pursuant to the General Management Plan the Park Service placed signs around the Monument announcing the "sacred" nature of Rainbow Bridge. Some of the signs read as follows: "Neighboring Indian tribes consider Rainbow Bridge a sacred religious site. Please respect these long-standing beliefs. Please do not approach or walk under Rainbow Bridge." "To Native American tribes/nations, Rainbow Bridge is a sacred religious site. In respect of these long-standing beliefs, we request your *voluntary compliance* in not approaching or walking under Rainbow Bridge."
>
> * * *
>
> The Park Service has also posted two declarations on its official Rainbow Bridge website that read as follows: "Please visit Rainbow Bridge in a spirit that honors and respects the cultures to whom it is sacred." "To Native American nations, Rainbow Bridge is sacred. Please respect these long-standing beliefs. We request your *voluntary compliance* in not approaching or walking under Rainbow Bridge." (Emphasis added.)

Germane to our discussion are the several "encounters" between Johnson and DeWaal with park employees. In the complaint, Johnson alleged that in October, 1997, the following encounter occurred between herself and park officials:

> The same Ranger then approached Mrs. Johnson's group and ordered them to leave the area. When asked why they should move the Ranger told them that their presence on the far side of Rainbow Bridge had the effect of encouraging others to walk underneath the bridge. Although they wanted to stay where they were, Mrs. Johnson and the others were compelled to comply with the Ranger's demands.

In the complaint, DeWaal alleged an encounter with the park service employees as follows:

> On July 18, 1999, Earl DeWaal and members of his family and friends traveled to Rainbow Bridge. While taking in the view from the official viewing area, Mr. DeWaal asked a Park Service Ranger if anyone was allowed to walk underneath the Monument. The Ranger initially told Mr. DeWaal that no one could approach the Monument. However, when Mr. DeWaal asked for a reason, the Ranger capitulated and told him that he (Mr. DeWaal) could use the official trail to Rainbow Bridge, but threatened to cite or arrest him if he stepped off of the trail. However, there was no visible "trail" to Rainbow Bridge, and when Mr. DeWaal asked the Ranger to point out the path the Ranger refused, telling Mr. DeWaal that he should talk to a supervisor.
>
> Immediately thereafter, Senior Ranger Mike Dedman arrived. Mr. DeWaal informed Rander

> Dedman that preventing visitors from approaching Rainbow Bridge was unlawful. Ranger Dedman responded by offering to escort Mr. DeWaal and some members of his group to Rainbow Bridge. Just then, another group of people from an official tour group arrived. Ranger Dedman withdrew his offer of escort and told Mr. DeWaal that no one could use the trail. When asked for a reason why, Ranger Dedman responded that use of the trail was prohibited for reasons of protecting Native American religion – specifically, in order to prevent desecration of the site. Ranger Dedman confirmed that if Mr. DeWaal attempted to approach Rainbow Bridge he would be cited or arrested. Although he wanted to use the trail to walk underneath Rainbow Bridge, Mr. DeWaal was compelled not to for fear of being cited or arrested.

In his deposition, DeWaal mentioned an additional encounter he had with the park service in 1998. On appeal, counsel, in his brief, refers to that encounter as follows:

> In July or August of 1998, Earl DeWaal traveled to the Monument with his wife, Vickie, and several of their children. A uniformed National Park Service Interpreter/Ranger requested that Mr. DeWaal and his family not approach or walk beneath Rainbow Bridge. . . . . Although Mr. DeWaal and his family wanted to walk beneath Rainbow Bridge, Mr. DeWaal and his family felt compelled by the actions and authority of the National Park Service Interpreter/Ranger and did not approach Rainbow Bridge. *Id.*

The present case challenging the policies and practices of the Park Service was brought pursuant to the

Administrative Procedures Act, 5 U.S.C. §§ 701-06 (2000). The plaintiffs sought declaratory and injunctive relief from those policies which informed visitors to the Rainbow Bridge National Monument about the cultural and religious significance of Rainbow Bridge to Native American tribes in the area, including a policy of asking visitors to voluntarily refrain from approaching or walking under the Bridge. (In this regard, the record indicates that, while the plaintiffs refrained from walking under the bridge, the "policies and practices" of the Park Service wherein it asked visitors to voluntarily comply did not deter many others who, in fact, did walk under the bridge.) In support thereof, their complaint set forth the several "encounters" between Johnson, in 1997, and DeWaal, in 1999, and the park officials.

Johnson and DeWaal further alleged in their complaint that the Park Service's policy of encouraging visitors to refrain from walking under the Bridge violated the Establishment Clause of the First Amendment to the Constitution because it had the purpose and effort of advancing and endorsing Native American religion.

Although this is a review of an administrative policy pursuant to the Administrative Procedures Act, the district court, with the consent of all parties, permitted discovery, which included, *inter alia,* testimony concerning the "encounters" between Johnson and DeWaal with park employees. It was in this setting that the defendants filed a motion to dismiss and Johnson and DeWaal, and the other plaintiffs, filed a motion for summary judgment. As indicated, the district court dismissed the claim of Johnson on the grounds that she did not have standing. The district court also held that DeWaal did not have standing based on his "encounter" with park officials in 1999, but that he

did have standing on his 1998 "encounter" with park officials. As to that aspect of the case, the district court went on to hold that the policy and practice of the Park Service to ask visitors to voluntarily refrain from walking under the Bridge did not violate the Establishment Clause.

The first issue to be resolved is whether the district court erred in holding that Johnson lacked standing, and that DeWaal had standing to bring this action. Our study of the matter convinces us that the district court was correct in holding that Johnson lacked standing, and that the district court erred in concluding that DeWaal had standing to maintain the action.

In *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-1 (1992), the Supreme Court articulated the "irreducible constitutional minimum" necessary to Article III standing as follows:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'[.]" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant . . . and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (Citations omitted.)

In line therewith, in *Ash Creek Mining Co. v. Lujan,* 969 F.2d 868, 874-5 (10th Cir. 1992), we said that a party

who would invoke federal jurisdiction "bears the burden of establishing these elements" set forth in *Lujan v. Defenders of Wildlife.* In *State of Utah v. Babbitt,* 137 F.3d 1193, 1202 (10th Cir. 1998), we stated that "[s]tanding is not measured by the intensity of a party's commitment, fervor, or aggression in pursuit of its alleged right and remedy." In that same case, we went on to speak as follows:

> "[the elements of constitutional standing] are not mere pleading requirements but rather [are] an indispensable part of the plaintiff's case." *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. at 2136. Consequently, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

State of Utah v. Babbitt, 137 F.3d at 1204.

As previously stated, in our view the district court was correct in holding that Johnson did not have standing to maintain this action and that, contrary to the holding of the district court, DeWaal also did not have standing. *Bear Lodge Multiple Use Ass'n. v. Babbitt,* 175 F.3d 814 (10th Cir. 1999), *cert. denied,* 529 U.S. 1037 (2000), has particular pertinency to the present case. The fact situation in *Bear Lodge* is quite similar to the fact situation in the instant case. *Bear Lodge* concerned a national monument in Wyoming where the Park Service had a policy of asking that climbers "voluntarily refrain from climbing during the month of June when American Indians engage in The Sun Dance and other ceremonies." *Id.* at 815. The "climbers" challenged that policy and practice. In *Bear Lodge,* the district court held that the plaintiffs there had standing to maintain the action, but dismissed their claims on

the merits. On appeal, we held that none of the plaintiffs had standing, and we did not reach the merits of the case. In so doing, we spoke in *Bear Lodge* as follows:

> In short, the Climbers "claim that the Constitution has been violated, [but] they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485, 102 S.Ct. 752, 765, 70 L.Ed2d 700 (1982). The Climbers are clearly incensed by the NPS' request that they voluntarily limit their climbing, but
>
> > standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. That concrete adverseness which sharpens the presentation of issues, is the anticipated consequence of proceedings commenced by one who has been *injured in fact;* it is not a permissible substitute for the showing of injury itself.
>
> *Id.* at 486, 102 S.Ct. at 766 (internal quotations and citations omitted). Because they have alleged no injury as a result of their claim, the FCMP improperly establishes religion, we hold the Climbers have no standing to sue in this case. (Emphasis added.)

Bear Lodge Multiple Use Ass'n. v. Babbitt, 175 F.3d at 822.

Counsel suggests that the present case is different from *Bear Lodge.* We disagree. We believe this case is controlled by *Bear Lodge.* In short, under *Bear Lodge,* neither of these plaintiffs has standing to challenge the "policy or practice" of the Park Service, which asks visitors

to "voluntarily" refrain from going to a certain area of the park out of respect for the religious significance the particular area has for a Native American Indian tribe, on First Amendment grounds.

Based on *Bear Lodge,* we affirm the district court's dismissal of Johnson's claim based on lack of standing, and, at the same time, we affirm the district court's ultimate dismissal of DeWaal's claim. However, in connection with DeWaal, we, unlike the district court, are of the view that he, too, lacked standing, and, as in *Bear Lodge,* we do not reach the merits of his claim that the policies and practices of the Park Service asking visitors to voluntarily refrain from approaching and walking under the bridge violated the Establishment Clause of the First Amendment.

Judgment affirmed.

Entered for the Court,

Robert H. McWilliams
Senior Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

NATURAL ARCH AND BRIDGE SOCIETY, a Colorado non-profit corporation; ROBERT MOORE; DAVID BRANDT-ERICSON; HARVEY LEAKE; EVELYN JOHNSON; and EARL DeWAAL, individuals,

Plaintiffs,

vs.

JOSEPH F. ALSTON, Superintendent, Rainbow Bridge National Monument; ROBERT G. STANTON, Director of the National Park Service; and the NATIONAL PARK SERVICE,

Defendants.

Civil No. 2:00-C-0191J

MEMORANDUM OPINION & ORDER (CORRECTED TEXT)

(FILED JUL. 02, 2002)

I. Introduction

On March 3, 2000, the plaintiffs filed a complaint asking this court to declare that portions of the National Park Service's 1993 General Management Plan ("1993 GMP") violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fifth Amendment to the United States Constitution. The plaintiffs also sought injunctive relief to prevent the defendants from enforcing the allegedly unconstitutional

portions of the 1993 GMP. On February 14, 2001, the defendants filed a motion to dismiss and on February 15, 2001, the plaintiffs filed a motion for summary judgment.[1] On April 30, 2001, the court heard oral argument on the parties' motions. William Davis Thode from Mountain States Legal Defense Fund appeared on behalf of the plaintiffs and Carlie Christensen, James J. Dubois, and Kevin Jones appeared on behalf of the defendants. Having reviewed and considered the motion, memoranda and exhibits submitted by the parties, and having heard and considered counsel's arguments concerning the same, the court hereby rules as follows:

II. Background

A. Rainbow Bridge National Monument

Rainbow Bridge is a unique natural resource of national and international significance. (R. at 0087.) Located in the rugged canyon country of Southern Utah, it is the world's largest natural bridge, spanning 275 feet, arching to a height of 290 feet, and is 42 feet thick at the top and 33 feet wide at the narrowest point. (R. at 0006.) Made up of Kayenta sandstone and Navajo sandstone,

[1] This court's jurisdiction to review the 1993 GMP falls under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000). *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). However, because this case involved analysis of issues outside the scope of the administrative record, this court, upon joint motion, (Joint Motion to Consolidate Briefing, filed March 1, 2001 (dkt. no. 28)), entered an order consolidating the parties briefing. (Order Granting Joint Motion to Consolidate Briefing, filed March 2, 2001 (dkt. no. 29).) Thus, each dispositive motion filed by the parties was treated as such and also treated as an opening brief for purposes of the Administrative Procedure Act.

stream erosion caused the bridge's formation by cutting through a tight meander in an upper layer of Navajo sandstone. (R. at 0087-88.) Because of the unique interplay between stream erosion and Navajo sandstone, bridges are less common than arches in Rainbow Bridge's surrounding environment. (R. at 0087.) Its remote location, together with the rugged environment of the area, left the bridge unpublicized until it was reached by the Douglass-Cummings Party on August 14, 1909.[2] (R. at 0011.)

Although not officially publicized until 1909, the significance of Rainbow Bridge to Native Americans can be traced back for over a century. (R. at 0033.) A variety of Native American tribes, such as Navajo, Hopi, San Juan Paiute, and others, view Rainbow Bridge and other nearby features and sites as important to their spiritual beliefs and identity as a people. (R. at 2064.) In 1909, for example, it was noted that the Navajo guide, Dogeye-begay, rode around the end of the bridge because he did not know the prayer to insure his safe return should he pass beneath it. (R. at 0033.) Similar observations were noted by other parties who utilized Navajo guides to reach the bridge. To many Navajos, Rainbow Bridge is a sacred

[2] Two parties, one directed by a government surveyor, W.W. Douglass, and the other directed by University of Utah Dean Byron Cummings, set out to discover the bridge that Native Americans said could be found near Navajo Mountain. (R. at 0011.) The parties, however, eventually met and joined forces. (*Id.*) Interestingly, two Paiutes, Jim Mike and Nasja Begay, guided the parties to the bridge. (*Id.*)

place.[3] (*Id.*) As such, they believe that it should be respected by all humans. (*Id.*)

To Navajos, the form of the rainbow is a symbol of protection and danger past. (R. at 0033-34.) Rainbow Bridge appears to be associated with the Navajo sun deity and his rainbow path across the sky and with the Hero Twins, one of whom was fathered by the sun. (R. at 0034.) One historian explains:

> The Navajo have a tradition that long, long ago one of their hero gods, hunting in the canyon, was suddenly entrapped by a rush of flood waters. In this predicament, with escape cut off, death for the hunter seemed certain. But just then the great Sky Father cast a rainbow before the torrent, the hero god climbed to safety across the arch, and the latter was turned to stone and has so remained until this very day.

(*Id.*) (quoting Judd Neil, *The Discovery of Rainbow Bridge,* National Parks Bulletin, Vol. 9, No. 54, November 1927). Known in the Navajo tongue as Tsi-Na-Ne-Ah (meaning arch rock or rock bridge), Navajos consider Rainbow Bridge to be the most significant of natural bridges in the area due to its relationship and western proximity to Navajo Mountain. (R. at 0169.) Traditional Navajo ceremonies and rites are private and passed on from generation to generation. (*Id.*)

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[3] Since the Navajo culture considers itself to be living with nature, all things that nature has made are considered sacred. (R. at 0169.) For Native Americans, Rainbow Bridge should be kept in as much of a natural setting as possible. (*Id.*)

Other Native American tribes, including San Juan Paiute, Hopi, and Pueblo, were also said to have accorded special significance to Rainbow Bridge. One Hopi migration legend, while not specifically mentioning Rainbow Bridge, places certain clan ancestors near Navajo Mountain. (*Id.*) The legend tells of a rainbow which swung around until its end touched Navajo Mountain where the Snake Clan people were dropped. (*Id.*) In prehistoric times, Pueblo Indians constructed a primitive structure at the base of Rainbow Bridge which some say may have served as an altar. (*Id.*) It was a main object of interest until it passed out of existence in the early 1930s. (*Id.*)

After its formal discovery in 1909, the bridge's uniqueness was recognized by President William H. Taft who on May 30, 1910, issued Presidential Proclamation Number 1043, setting aside a 160-acre tract of land under the authority granted him by section 2 of the 1906 Act for the Preservation of American Antiquities, 16 U.S.C. § 431 (2000), for scientific and historical purposes. (R. at 0087.) President Taft's Proclamation read, in part,

> WHEREAS, an extraordinary natural bridge, having an arch which is in form and appearance much like a rainbow, and which . . . is of great scientific interest as an example of eccentric stream erosion, and it appears that the public interest would be promoted by reserving this bridge as a National Monument, together with as much land as may be needed for its protection;
>
> Now therefore, I . . . do hereby set aside as the Rainbow Bridge National Monument, one surveyed tract of land, embracing said natural bridge, containing one hundred and sixty acres of land. . . .

(*Id.*) After 1910, the federal protection of Rainbow Bridge continued to evolve.

In 1916, Congress established the National Park System by enacting the National Park Service Organic Act, 16 U.S.C. § 1 *et seq.* (2000). The Organic Act established the National Park Service as the managing agency for national monuments, such as Rainbow Bridge. 16 U.S.C. § 1 (2000). Section 1 states that

> The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Id. Thus, visitors to the bridge are subject to the regulation of the National Park Service.

In 1958, pursuant to the Colorado River Storage Project, 43 U.S.C. § 620 (1994), Congress approved the construction of the Glen Canyon Dam, which is fifty-eight miles below Rainbow Bridge National Monument. *Badoni v. Higginson,* 638 F.2d 172, 175 (10th Cir. 1980). Upon its completion in 1963, the dam formed the Glen Canyon Reservoir, also known as Lake Powell. *Id.* The federal lands adjacent to Lake Powell, other than the monument, comprise the Glen Canyon National Recreational Area, 16 U.S.C. § 460dd (2000), and are administered by the National Park Service. *Id.* §§ 1, 460dd-3. A small portion of

Lake Powell extends to the monument boundary in its northwest corner, thus forming a common boundary between Rainbow Bridge National Monument and Glen Canyon National Recreation Area. (R. at 0006.) Pursuant to 43 U.S.C. § 620 (1994), the Secretary of the Interior is required to "take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument." *Id.*

Prior to the creation of Lake Powell, Rainbow Bridge, which is surrounded by the Navajo Reservation, was relatively isolated. (R. at 0006.) Its remoteness, coupled with the rugged environment,[4] kept visitation numbers quite low. (R. at 32.) The lake provided boat access to the monument, increasing visitor use. In 1955, about 1,000 people visited Rainbow Bridge. (R. at 0038, 2063.) In 1974, only four years after Lake Powell had entered the 160-acre tract of the monument, *Badoni,* 638 F.2d at 175, 55,104 visitors came to Rainbow Bridge National Monument. (R. at 0014.) By 1986, approximately 65,000 visited the bridge just in the month of July – an average of 270 people at any one time over an eight-hour day. (R. at 0390.) In 1995, visitation peaked at approximately 346,000 visitors. (R. at 2878.) It was anticipated that if the increase in visitation continued, by 2000, visitation would approach 450,000. (R. at 0390.)

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[4] A fifty-two mile dirt road across part of the reservation to the base of Navajo Mountain brought potential visitors to the lodge furnishing guide services. (R. at 0037.) From there, visitors continued on foot or horse for a two-day round trip to the bridge. (*Id.*) Later, a river trip, via powerboat up the Colorado River from Lees Ferry to the mouth of Forbidding Canyon, required three days and a twelve mile-hike to the monument. (R. at 2063.)

The adjacent Glen Canyon National Recreation Area is extremely popular, and its visitors often access the national monument. (R. at 0016.) The management needs and visitor-use patterns of the two areas are necessarily different due to the different policies and philosophies applicable to a national monument versus a national recreation area. (*Id.*) For instance, as previously noted, concerning Rainbow Bridge National Monument, the National Park Service is charged with "conserv[ing] the scenery and the natural and historic objects and the wild life . . . and . . . provid[ing] for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1 (2000). In contrast, concerning Glen Canyon National Recreation Area, the National Park Service is directed to "provide for public outdoor recreation use and enjoyment of Lake Powell and lands adjacent thereto in the States of Arizona and Utah . . . ." 16 U.S.C. § 460dd (2000). The administration of both the recreation area and the monument, with somewhat conflicting purposes, proved to be difficult. As early as the mid-1970s, the National Park Service recognized the need for public education and interpretation of the similarities and differences between the recreation area and the monument. (R. at 0015, 0029-68.) The Park Service's long-term goal was to define the desired character of the visitor experience within the monument with particular attention paid to differentiating between orienting visitor use to water-based recreation and sightseeing and orienting visitor use to inspire a sense of respect and awe for the

national monument and protect against visitor impacts.[5] (R. at 0089-90.)

By the late 1980s, as a result of the changes in visitation to the monument, including convenient access by more recreation-oriented visitors, the monument suffered adverse impacts. For instance, the large number of visitors on the few accessible acres of the monument resulted in erosion and loss of soil, trampling of vegetation, multiple trailing, rock graffiti, and litter. (R. at 0090, 0139-40, 0209, 0221, 0243, 2066; *see also* R. at 2731-34 (Park Service incident reports of vandalism at Rainbow Bridge).) Crowding and noise became an issue, which disturbed the tranquil setting of the monument. (R. at 0043-44, 0090, 0154, 0156.) Cultural sites, such as petroglyphs and archeological sites, were being damaged by visitors touching, climbing, and defacing petroglyphs with graffiti. (R. at 0139, 0345.) The number and manner of operation of boats raised safety and pollution issues. (R. at 0153, 0338.) Unlimited visitor access desecrated the sanctity of the bridge to surrounding Native American tribes and lessened its overall cultural importance. (R. at 0090.)

Recognizing the need for public education and interpretation and the need to reduce visitor impact to the monument, in 1985, after eleven years of planning, (R. at 0029-68), the National Park Service issued a Statement for Management for the monument. The Park Service's

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[5] The first General Management Plan stated that "[a]n important goal of the monument's interpretation, as well as its overall management, is to convey to the visitors the message that the monument is a special place, apart from the rest of Lake Powell, and that it was set aside, not for recreation, but to preserve a natural wonder." (R. at 0092.)

main objectives were to (1) "preserve Rainbow Bridge by such means as will leave this outstanding natural resource unimpaired for the enjoyment of present and future generations"; (2) "identify, determine the significance of, and protect the cultural resources within the national monument"; (3) "promote public understanding and appreciation of Rainbow Bridge and the park's other natural resources in a setting as free as possible from the influence of human activities"; (4) "determine and interpret the cultural significance of Rainbow Bridge";[6] (5) "cooperate with the Bureau of Reclamation to insure that

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[6] The 1974 Interpretive Prospectus first noted that

> [f]rom the analysis of potential interpretive values existing at the national monument, it becomes evident that the impressive feature extends beyond its physical dimensions into the realm of historic and cultural appreciation. Rainbow Bridge, although a natural feature, has symbolic value much like such places as Mount Rushmore, the Statue of Liberty, or the Lincoln Memorial.
>
> Interpretation seeks to identify these particular values, both congenial and provocative, as well as to demonstrate their role in a living tradition concept. This concept simply invites visitors to assume a receptive state of awareness, much as one might in any meeting hall, cathedral, or temple of the mind. It encourages respect for cultural beliefs and strengthens the identity and heritage of the Navajo Indian.
>
> It suggests that an honest appraisal of the historic example set by Dogeye-begay and other Indian guides, may offer a new awareness and appreciation for both natural and cultural values, irregardless of the life style from which they may originate.
>
> Because of their beliefs, these men rode around the end of the bridge abutment rather than go beneath or through the span. Visitors should be aware of this behavior as part of the overall interpretation of the site.

(R. at 0050.)

management of the Lake Powell impoundment is compatible to the greatest degree possible with the long-term preservation of Rainbow Bridge"; and (6) "strive to foster and maintain a better cooperative relationship for the use and protection of the national monument with the Navajo Tribe." (R. at 0018.)

In September 1990, the National Park Service distributed the Draft General Management Plan, Development Concept Plan, Resource Management Plan, Interpretive Prospectus and Environmental Assessment for the monument ("DGMP/EA"). (R. at 0069, 2036.) The DGMP/EA presented a proposal and three alternatives for addressing the objectives outlined in the 1985 Statement for Management and mitigating the impacts on the environment. (R. at 0071, 2036.) During the ninety-day review period, the Park Service received a total of 86 comments. (R. at 2036.)

As a result of substantive public comment,[7] the National Park Service chose to reassess the range of feasible alternatives presented and reissue the DGMP/EA. (R. at 2036.) The Park Service released this reassessment for a 60-day public review period on December 15, 1991, ending February 15, 1992. (*Id.*) Representatives of the Park Service met with a variety of interested groups, including the Navajo Tribe. (*Id.*) This time, the Park Service received a total of 95 comments. (*Id.*)

The Park Service's efforts to educate and reduce visitor damage to the monument finally culminated in the

[7] Many of the public comments requested that visitation to the monument should in some fashion be reduced or controlled. (R. at 2039.)

1993 final General Management Plan ("1993 GMP"). Published in June 1993, the 1993 GMP "addresses the issues of diverse public expectations, visitor experience, protection of natural and cultural resources, access, interpretive services, and facilities." (R. at 2019.) For instance, to protect and enhance visitor experience, to promote a passive and awe-inspiring tone, and to reduce damage to Rainbow Bridge as a result of visitor mischief, the 1993 GMP proposes a carrying capacity at the monument that fluctuates during high and low season. (R. at 2026-27, 2050-56.) In addition, in order to mitigate damage to soil and vegetation, the 1993 GMP contemplates a program for rehabilitating access trails, restoring prior damage, and eliminating multiple trails. (R. at 2030-31.) This program includes maintaining cement trails from the boat dock to two main viewing areas, discouraging use of the dirt trail from the second viewing area to Rainbow Bridge, reestablishing native species, and closing specific areas for revegetation. (*Id.*)

The 1993 GMP also acknowledges the important cultural resources of the monument, (R. at 2025), and how to educate the public concerning the customs and beliefs, as they relate to Rainbow Bridge, of other cultures. For instance, both the 1993 GMP and the accompanying Interpretive Prospectus contemplate educating the public that some neighboring Native American cultures view Rainbow Bridge as a sacred site. (R. at 2027, 2059-60, 2064-65.) Although neither the 1993 GMP nor the Interpretive Prospectus prohibits visitors from approaching or walking underneath Rainbow Bridge, both contemplate discouraging "visitor access to the base of the bridge itself and to the area directly below the bridge . . . [out of] respect for the sacred nature of this area to American

Indian groups." (R. at 2027.) A wayside sign and brochure expresses the spiritual significance to the Native Americans and the Park Service's request that the public respect cultural differences by voluntarily not walking underneath Rainbow Bridge. (R. at 2072-73.) Two of the many goals of the Interpretive Prospectus are to "help visitors understand that different cultures perceive resources differently, i.e., some neighboring American Indians regard Rainbow Bridge as sacred," and "generate visitor interest in the cultures and lifestyles, from prehistoric to present times, of the people of the Rainbow Bridge region." (R. at 2068.)

B. The Commencement of this Action

On March 3, 2000, plaintiffs filed a complaint challenging the 1993 GMP as it relates to the Park Service's policy to request that the public respect cultural differences by voluntarily not walking underneath Rainbow Bridge. (Complaint, filed March 3, 2000 (dkt. no. 1).) In their complaint, plaintiffs alleged that the relevant portions of the 1993 GMP violated the Establishment Clause of the First Amendment, (*id.* at 10-12), and the Equal Protection Clause of the Fifth Amendment to the United States Constitution. (*Id.* at 12.) Plaintiffs sought declaratory and injunctive relief. (*Id.* at 13-15.)

In February 2001, both parties filed dispositive motions. This court's jurisdiction to review the 1993 GMP and Interpretive Prospectus in light of plaintiffs' claim is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000). However, in the Attorneys' Planning Meeting Report, the parties identified substantive issues outside of the scope of the administrative record on which discovery was necessary. (Attorneys' Planning Meeting

Report, filed June 27, 2000 (dkt. no. 7).) Therefore, upon joint motion, this court ordered the parties to consolidate their briefing. On February 14, 2001, defendants filed a motion to dismiss plaintiffs' complaint for lack of standing and for failure to state a claim on plaintiffs' Establishment Clause and Equal Protection causes of action.[8] On February 15, 2001, plaintiffs filed a motion for summary judgment seeking declaratory and injunctive relief on plaintiffs' substantive claims. Both plaintiffs and defendants timely filed their appropriate response and reply memorandums. Therefore, the court will address each party's motion below.

III. Discussion

A. Defendants' Motion to Dismiss Standing

In *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), the United States Supreme Court articulated the Article III standing requirements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.

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[8] Judicial review of administrative decisions under the APA are processed as appeals and governed by the Federal Rules of Appellate Procedure. *Olenhouse,* 42 F.3d at 1580. Fed. R.App. P. 27 specifically allows a party to file a motion to dismiss.

> Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal quotations and citations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements and of coming forward with evidence of specific facts which prove standing." *Bear Lodge Multiple Use Assoc. v. Babbitt,* 175 F.3d 814, 821 (10th Cir. 1999) (citing *Lujan,* 504 U.S. at 561).

Defendants contend that the individually named plaintiffs lack standing because they have failed to establish the requisite of injury-in-fact. "Establishing injury in fact requires 'a factual showing of perceptible harm.'" *Id.* (quoting *Lujan,* 504 U.S. at 566 (quotation omitted)). "'[T]o satisfy Article III's case or controversy requirement, a litigant in federal court is required to establish its own injury in fact.'" *Id.* (quoting *National Council for Improved Health v. Shalala,* 122 F.3d 878, 882 (10th Cir. 1997)). "Although a given action may cause harm to third persons, 'a litigant may invoke only its own constitutional rights and may not assert rights of others not before the court.'" *Id.* (quoting *National Council,* 122 F.3d at 882). The court will address each plaintiff to determine whether they have met their burden of establishing an injury-in-fact.

Individual Plaintiffs

Robert Moore, David Brandt-Ericson, and Harvey Leake

The complaint identifies plaintiffs Moore, Brandt-Ericson, and Leake as follows:

6. Plaintiff Robert Moore is a member of [National Arch and Bridge Society ("NABS")] and also serves as the President of NABS.

7. Plaintiff David Brandt-Ericson is a member of NABS and also serves as the Secretary of NABS.

8. Plaintiff Harvey Leake is a member of NABS and is the author of a book about Rainbow Bridge.

(Complaint, filed March 3, 2000 (dkt. no. 1), at 3-4.) Plaintiffs fail to further identify a particularized injury suffered by plaintiffs Moore, Brandt-Ericson, and Leake. Although plaintiffs Moore, Brandt-Ericson, and Leake argue that they regularly visit Rainbow Bridge and therefore have standing to challenge the 1993 GMP, without an allegation or a proffer of evidence in the record supporting a "personal injury suffered by [these plaintiffs] *as a consequence* of the alleged constitutional violation," *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 485, (1982), the court must conclude that plaintiffs Moore, Brandt-Ericson, and Leake lack standing. Therefore, this court grants defendants' motion to dismiss for lack of standing as to plaintiffs Moore, Brandt-Ericson, and Leake.

Evelyn Johnson

Ms. Johnson is a member of NABS and on its board of directors. In October 1997, a group of people, including Ms. Johnson, hiked through the Navajo Reservation to the backside of Rainbow Bridge. Approximately thirty minutes after Ms. Johnson and her group reached Rainbow Bridge, a ranger approached them and stated that they "were in

an area [they] weren't supposed to be in and [they] were supposed to be down with the other people that were coming from the marina." (Deposition of Evelyn Johnson, at 29:3-6.) The ranger did not demand that Ms. Johnson and her group leave the area; instead, he "asked very nicely," (*id.* at 38:25), in the form of a "request." (*Id.* at 42:12.) The ranger did not threaten Ms. Johnson nor a member of her group with citation if they chose not to leave the area. (*Id.* at 31:17-18.) The ranger did not specifically state why he was asking Ms. Johnson and her group to leave the area. (*Id.* at 29:2-7.) From the deposition excerpts submitted with the parties' motions, it is unclear whether Ms. Johnson or members of her group were sitting in an area closed for revegetation. Ms. Johnson either did not notice or read signs notifying the public that certain areas around the bridge were closed due to revegetation efforts, (*id.* at 28:11-22; 31:6-13), nor signs requesting or mandating that people not walk underneath the bridge. (*Id.* at 31:11-13.)

Although it is clear that Ms. Johnson and her group voluntarily chose to comply with the ranger's request and leave the area, it is unclear whether the ranger's request stems from the Park Service's policy of asking that people voluntarily comply with not walking underneath the bridge or the Park Service's revegetation efforts. Ms. Johnson did not allege in her complaint nor state in her deposition testimony that the ranger requested her departure from the bridge because of the Park Service's voluntary policy. Although Ms. Johnson may feel that this conclusion is a logical inference, there are no facts in the record supporting Ms. Johnson's logic. Ms. Johnson has failed to bear her burden to establish the "irreducible constitutional minimum of standing" that she has "suffered an 'injury in fact'

. . . which is . . . concrete and particularized." *Lujan,* 504 U.S. at 560; *see also United States v. Hays,* 515 U.S. 737, 742, (1995) (refusing "to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power"). Without more, Ms. Johnson clearly lacks standing to challenge the 1993 GMP as implemented by the Interpretive Prospectus. Therefore, this court grants defendants' motion to dismiss plaintiff Evelyn Johnson.

Earl DeWaal

In the complaint, Mr. DeWaal relies on the following alleged incident at Rainbow Bridge in July 1999 to establish standing to challenge the 1993 GMP and Interpretive Prospectus:

> On July 18, 1999, Earl DeWaal and members of his family and friends traveled to Rainbow Bridge. While taking in the view from the official viewing area, Mr. DeWaal asked a Park Service Ranger if anyone was allowed to walk underneath the Monument. The Ranger initially told Mr. DeWaal that no one could approach the monument. However, when DeWaal asked for a reason, the Ranger capitulated and told him that he (Mr. DeWaal) could use the official trail to Rainbow Bridge, but threatened to cite or arrest him if he stepped off of the trail.
>
> Immediately thereafter, Senior Ranger Mike Dedman arrived. Mr. DeWaal informed Ranger Dedman that preventing visitors from approaching Rainbow Bridge was unlawful . . . . Ranger Dedman . . . told Mr. DeWaal that no one could use the trail. When asked for a reason why, Ranger Dedman responded that use of the trail

> was prohibited for reasons of protecting Native Americans religion – specifically, in order to prevent desecration of the site. Ranger Dedman confirmed that if Mr. DeWaal attempted to approach Rainbow Bridge he would be cited or arrested. Although he wanted to use the trail to walk underneath Rainbow Bridge, Mr. DeWaal was compelled not to for fear of being cited or arrested.

(Complaint, filed March 3, 2000 (dkt. no. 1), at 9-10.)

Although somewhat contradictory, Mr. DeWaal's deposition testimony supports the complaint's characterization that both rangers *prohibited* Mr. DeWaal from approaching and/or walking underneath the bridge. After arriving at the monument by boat, Mr. DeWaal walked to the bridge's viewing area and asked one ranger "if I could go up to the bridge." (Deposition of Earl DeWaal, at 26:2-3.) According to Mr. DeWaal the ranger responded with an outright "no," (*id.* at 26:5), then followed up by stating that "he didn't want me to go underneath there, that there were groups of Indians that they would allow to go up there but I was not allowed up there." (*Id.* at 26:11-14.) Later, Mr. DeWaal spoke with another ranger about approaching the bridge. According to Mr. DeWaal, the ranger responded: "He said, 'Well if you go up there,' he said, 'That is fine, but if you step off the trail, I will either cite you or arrest you.'" (*Id.* at 30:3-5; *see also id.* at 34:1-3 ("He told me that if I went up there to the bridge . . . that I would be cited or arrested.").)

Based on this July 1999 incident between Mr. DeWaal and the two park rangers, Mr. DeWaal asserts that he has been directly affected by the 1993 GMP, as implemented by the Interpretive Prospectus, and therefore has standing to challenge the plan.

While it may be that Mr. DeWaal has alleged a concrete injury, his injury (allegedly being prohibited from approaching Rainbow Bridge) falls outside of the 1993 GMP's interpretative plan of requesting voluntary compliance with not approaching or walking underneath Rainbow Bridge. On their face, the 1993 GMP and is accompanying Interpretive Prospectus do not prohibit the general public from approaching or walking underneath Rainbow Bridge; they only seek voluntary forbearance out of respect for different cultures. As the United States Supreme Court stated in *Lujan,*

> there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. [And], it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61. Mr. DeWaal's alleged injury is not fairly traceable to the Park Service's voluntary compliance policy, but is the result of "the independent action of some third party [the rangers] not before the court." *Id.* at 560. The July 1999 incident does not give Mr. DeWaal standing to challenge the 1993 GMP and Interpretive Prospectus under the APA. Mr. DeWaal's injury is redressable, if at all, in the form of a *Bivens* action against the individual rangers who allegedly prohibited him from approaching Rainbow Bridge. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

If Mr. DeWaal's standing was predicated only on the July 1999 incident, this court would be compelled to grant

defendants' motion to dismiss plaintiff Earl DeWaal for lack of standing. However, another alleged incident that took place in the summer of 1998 satisfies Article III's requirement that Mr. DeWaal suffer an injury-in-fact resulting from the challenged action. *See Lujan,* 504 U.S. at 560. In July or August of 1998, Mr. DeWaal visited Rainbow Bridge with his family. (Deposition of Earl DeWaal, at 39:3-4.) While there, he spoke with a ranger about approaching and walking underneath Rainbow Bridge. Mr. DeWaal recalled that the ranger "*asked* us not to go underneath the bridge." (*Id.* at 39:18-19.) When asked for a reason, the ranger responded that "it had to do with . . . the Indian religion." (*Id.* at 39:20-22; *see also id.* at 40:1-4 ("My recollection is that I remember her talking about the Indians. I remember vaguely that she asked us not to.").)

Based on this incident, Mr. DeWaal has alleged an injury-in-fact that is fairly traceable to the 1993 GMP and accompanying Interpretive Prospectus. *But see Bear Lodge,* 175 F.3d at 820-21 (holding that plaintiffs lack standing to challenge Park Service's policy of asking public to voluntarily refrain from climbing Devils Tower during month of June when American Indians engage in certain ceremonies "because they remain free to climb Devils Tower any time they choose . . . . Indeed, while many climbers have chosen not to climb during the month of June out of respect for American Indian use of the site, appellants . . . have continued to climb in June"). Unlike his July 1999 visit, Mr. DeWaal was not prohibited from approaching Rainbow Bridge, but was asked by a park ranger – without the threat of citation or arrest – not to do so out of respect for Native American beliefs. In addition, unlike Evelyn Johnson's incident, Mr. DeWaal's injury

stems from the Park Service's request for voluntary compliance in not approaching or walking underneath Rainbow Bridge. This action by the park ranger clearly falls within the scope of the 1993 GMP and accompanying Interpretive Prospectus. At this stage, therefore, Mr. DeWaal has standing to challenge the 1993 GMP and Interpretive Prospectus under the APA and this court must deny defendants' motion to dismiss plaintiff Earl DeWaal for lack of standing.

Natural Arch and Bridge Society

In *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333 (1977), the United States Supreme Court articulated the following three-part test for association standing:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343-44. Here, plaintiffs have failed to establish – as is their burden – that the association's members "would otherwise have standing to sue in their own right." *Id.* As discussed above, this court dismissed plaintiffs Moore, Brandt-Ericson, Leake, and Johnson from the complaint for lack of standing. Although this court retained jurisdiction over plaintiff DeWaal, his status in the case does not change the court's conclusion that NABS lacks standing. That is because Mr. DeWaal was not a member of NABS

when either his summer of 1998 or July of 1999 incidents occurred. (Deposition of Earl DeWaal, at 6:9-24.) It was not until after his July 1999 incident that Mr. DeWaal joined as a member of NABS. (*Id.*) As such, his alleged injury cannot be imputed to the association for purposes of standing. Although some members of NABS may visit Rainbow Bridge as plaintiffs' argue in the response to defendants' motion to dismiss, that is not enough to establish a member's injury-in-fact. The United States Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Hays,* 515 U.S. at 742. A generalized injury is all that NABS can plead in regard to the 1993 GMP and Interpretive Prospectus. Consequently, NABS does not have standing to challenge its propriety. Therefore, this court grants defendants' motion to dismiss plaintiff Natural Arch and Bridge Society for lack of standing.

Equal Protection

In the complaint, Mr. DeWaal alleges that

> The Park Service, through its policies and practices, now manages Rainbow Bridge in such a way as to create a class based on race and/or nationality, which class (Native Americans) is not subject to the general policy of the Park Service that prohibits visitors from approaching or walking under Rainbow Bridge. The Park Service has created two different standards for the use of federal land around Rainbow Bridge, allowing for the exclusive use of portions of federal land by a group of people distinguishable only by their race and/or nationality.

(Complaint, filed March 3, 2000 (dkt. no. 1), at 13.) Defendants argue that plaintiff's equal protection cause of action fails to state a claim for which relief can be granted.

This court agrees.

Plaintiff DeWaal alleges that the 1993 GMP and Interpretive Prospectus violates his equal protection guarantees because Native Americans are "not subject to the general policy of the Park Service that prohibits visitors from approaching or walking under Rainbow Bridge." (*Id.*) However, as the record submitted to the court clearly indicates, the 1993 GMP and Interpretive Prospectus do not "prohibit[ ] visitors from approaching or walking under Rainbow Bridge." (*Id.*) Instead, the 1993 GMP and Interpretive Prospectus request that visitors consider viewing Rainbow Bridge from the viewing area rather than walking up to or under the bridge. This invitation is in the form of a request, not a demand or prohibition. Native Americans are not singled out; in fact, under the 1993 GMP and Interpretive Prospectus, any visitor, including Native Americans, can walk to or under the bridge and *all* visitors are requested to forbear, without distinction. Therefore, as Native Americans are not treated any differently than other visitors to the monument under the 1993 GMP and Interpretive Prospectus, this court grants defendants' motion to dismiss plaintiff DeWaal's equal protection cause of action for failure to state a claim upon which relief can be granted.

B. Plaintiff DeWaal's Motion for Summary Judgment/Opening Brief

This court previously found that Mr. DeWaal's July 1999 incident did not confer standing for him to challenge

the 1993 GMP and Interpretive Prospectus under the APA; instead, that incident may provide Mr. DeWaal with a *Bivens* action against the individual rangers who allegedly prohibited him from approaching Rainbow Bridge. However, this court also found that based on Mr. DeWaal's allegations concerning the summer 1998 incident, Mr. DeWaal does have standing to challenge the 1993 GMP and Interpretive Prospectus under the APA. Therefore, this court will separately address Mr. DeWaal's motion for summary judgment as it relates to his *Bivens* claim involving the individual rangers and also treat his motion as an opening brief to challenge the 1993 GMP and Interpretive Prospectus under the APA.

Motion for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), the United States Supreme Court held that victims of a violation of the United States Constitution by a federal officer have a right to recover damages against the officer in federal court despite the absence of any statute conferring such a right. *Id.* The holding of the *Bivens* case has been extended to include causes of action based on the First Amendment. *See Paton v. La Prade,* 524 F.2d 862 (3d Cir. 1975); *White v. Boyle,* 538 F.2d 1077 (4th Cir. 1976); *Collier v. Estelle,* 506 F.2d 22 (5th Cir. 1975); *Yiamouyiannis v. Chemical*

Abstracts Serv., 521 F.2d 1392 (6th Cir. 1975); *Hostrop v. Board of Junior Coll. Dist.*, 471 F.2d 488 (7th Cir. 1972). However, in order to bring a *Bivens* action against a federal officer, the plaintiff must comply with the Federal Rules of Civil Procedure and name and properly serve the individual defendant. *See* Fed. R. Civ. P. 4, 10.

Having reviewed Mr. DeWaal's motion for summary judgment and the exhibits submitted by the parties, this court has concluded that at this stage, Mr. DeWaal's motion should be denied. As noted above, Mr. DeWaal's claim is in the form of a *Bivens* action against the individual rangers who allegedly prohibited Mr. DeWaal from approaching and/or walking underneath Rainbow Bridge. However, in his complaint, Mr. DeWaal failed to name, and later failed to properly serve the individual rangers. This court does not yet have personal jurisdiction over the rangers, and may grant no relief against them. As Mr. DeWaal has not shown that he is entitled to a judgment as a matter of law, this court therefore denies his motion for summary judgment.[9]

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[9] Although this court denies Mr. DeWaal's motion for summary judgment based on his failure to name and properly serve the individual rangers, this court would also be compelled to deny Mr. DeWaal's motion as there is a genuine issue of material fact concerning Mr. DeWaal's version of the events as they unfolded in July 1999. *See Deposition of Paul Nelson*, at 67-78 ("[Mr. DeWaal] said can I walk up to the bridge. . . . I said you can walk up to the bridge. And he wanted to know why he couldn't go anywhere he wanted to go. And I explained to him that there was a reveg area, and I pointed out the signs right behind him. He was standing right in front of a sign. And I said but there is an open trail and you can use that trail. And he says so are you going to arrest me if I walk up the trail. I said no, I'm not going to arrest you if you walk up the trail. I said you can walk up the trail, but you can't go into the reveg area. . . . [Mr. DeWaal] was yelling. He was

(Continued on following page)

Opening Brief

Judicial review of agency action is governed by section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2000). Section 706 requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an

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literally yelling."); *Incident Report,* filed by Ranger Paul Nelson concerning incident with Mr. DeWaal ("This individual immediately interrupted my conversation in a loud and boisterous manner by claiming that all of the signs are lies and that 'treehuggers' from the Sierra Club are responsible for the park service's way of managing Rainbow Bridge. He suggested that he could go anywhere he wanted in the area and that everything regarding the spirituality of the site is an outright lie. . . . I asked this individual to respect other peoples enjoyment of the site, and with that he got louder still and challenged me to prevent him from encroaching into the reveg area. He asked me if there was a trail and I replied to the affirmative. . . . [H]e stated that I wanted to arrest him and suggested that I would not show him the trail. Before I could respond he told me his attorney is preparing to sue the [Park Service] and demanded my name. He again suggested that I would not show him the trail, and that I just wanted to cite him."); *Deposition of Mike Dedman,* at 132- 52 ("Well [Mr. DeWaal] didn't direct anything to me initially. He literally yelled to everyone around him that there was a conspiracy between the Sierra Club, the park service, and Indians. And he said that three different times. . . . [Mr. DeWaal] kept wondering why you couldn't walk anywhere in the trail. He said the trail was closed. I said, no, there is a trail. I said, you can walk up there. I kept insisting. And then I do remember him responding about the park service closing off areas to the public in support of Indians. And he did use the word 'Injuns' at one point which I think I felt somewhat offended by."); Letter from visitor at Rainbow Bridge to National Park Service (August 1, 1999) ("During a recent visit to Lake Powell . . . one of the visitors began to verbally attack the ranger. . . . He was demanding his 'right to do whatever he wanted to without the intrusion of a special interest group,' however, he was very verbally abusive to the ranger. The visitor cursed and ranted for several minutes. . . . After I and several other visitors asked him to please leave, he did leave. The ranger never asked him to go; he continued to help the man understand.").

abuse of discretion, or otherwise not in accordance with the law." *Id.* § 706. "These standards require the reviewing court to engage in a 'substantial inquiry.' . . . An agency's decision is entitled to a presumption of regularity, 'but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.'" *Olenhouse,* 42 F.3d at 1574 (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415 (1971)). Nevertheless, a court's review under this standard is "narrow and deferential," the court being required to uphold the agency's action if it has "articulated a rational basis for the decision and has considered relevant factors." *Mountain Side Mobile Estates P'ship v. Secretary of Hous. and Urban Dev.,* 56 F.3d 1243, 1250 (10th Cir. 1995). "However, these limitations do not apply to questions of law. 'The [f]ailure to apply the correct legal standard or to provide . . . a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal.'" *Id.* (quoting *Nielson v. Sullivan,* 992 F.2d 1118, 1119-20 (10th Cir. 1993)).

In this case, plaintiff Earl DeWaal contends that the Park Service's 1993 GMP and Interpretive Prospectus violates (1) the Establishment Clause of the First Amendment and (2) the Equal Protection Clause of the Fifth Amendment to the United States Constitution. As this court granted defendants' motion to dismiss plaintiff DeWaal's equal protection cause of action for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6), this court will only address plaintiff's Establishment Clause claim.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. Amend. I. In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the United States Supreme Court established a three-part test for

lower courts to use when determining whether governmental action has the effect of establishing religion. According to the *Lemon* test, governmental action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion. *Lemon,* 403 U.S. at 612-13.

In *Lynch v. Donnelly,* 465 U.S. 668 (1984), Justice O'Connor's concurring opinion sought "to refine the *Lemon* analysis to focus more on whether the government is 'endorsing' religion." *Bauchman v. West High Sch.,* 132 F.3d 542, 551 (10th Cir. 1997) (citing *Lynch,* 465 U.S. 687-94). "Applying Justice O'Connor's refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that 'religion or a particular religious belief is favored or preferred.'" *Id.* (quoting *County of Allegheny v. ACLU,* 492 U.S. 573, 592-93 (1997)). Although Justice O'Connor's concurring opinion in *Lynch* appears to be the predominate test when evaluating Establishment Clause claims, *see id.* at 552, the Tenth Circuit applies "both the purpose and the effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon* . . . ." *Id.*

The test established by the Tenth Circuit in *Bauchman,* however, does not end this court's analysis. The government's ability to accommodate religious beliefs is an important consideration when determining whether the government's action has "either . . . the purpose or . . . the effect of conveying a message that 'religion or a particular religious belief is favored or preferred.'" *Id.* (quoting *County of Allegheny,* 492 U.S. at 592-93). The United

States Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136, 144-45 (1987) (holding that Florida's award of unemployment compensation benefits to claimant, who was discharged when she refused to work on her Sabbath, would not violate Establishment Clause (citing *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Walz v. Tax Comm'n,* 397 U.S. 664 (1970))).[10] Therefore,

> [r]ather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

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[10] In *Lynch,* Chief Justice Burger commented on the accommodation principle

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less the government. 'It has never been thought either possible or desirable to enforce a regime of total separation. . . . ' *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 760 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any. *See e.g., Zorach v. Clauson,* 343 U.S. 306, 314, 315 (1952); *McCollum v. Board of Education,* 333 U.S. 203, 211 (1948). Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause. *Zorach, supra,* 343 U.S. at 314.

Lynch, 465 U.S. at 673.

Lynch, 465 U.S. at 678. The issue presented in this case is whether the 1993 GMP, as implemented by the Interpretive Prospectus, is an appropriate accommodation, or whether it violates the Establishment Clause.

Purpose

"Recent cases suggest the purpose component of the endorsement test should evaluate whether the government's 'actual' purpose is to endorse or disapprove of religion (i.e., did the government intend to endorse or disapprove of religion)." *Bauchman,* 132 F.3d at 551. Because "the Constitution does not require that the purpose of every governmental sanctioned activity be unrelated to religion," Mr. DeWaal must show that the 1993 GMP and Interpretive Prospectus have "no 'clearly secular purpose'" or that "in spite of the existence of a legitimate secular purpose(s), the defendants' 'actual' purpose is to endorse or disapprove of religion." *Id.* at 554 (citations omitted).

The "'purpose' requirement aims at preventing the relevant government decisionmaker" – in this case, the National Park Service – "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Church of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 335 (1987). Had the Park Service demanded that visitors view Rainbow Bridge from the viewing area rather than walking up to or under the bridge, or prohibited visitor access to the bridge, then it could possibly be said that the Park Service had abandoned neutrality and intentionally promoted Native American religious beliefs over those of other cultures. Here, however, the 1993 GMP

and Interpretive Prospectus contemplate the public's voluntary compliance with the policy. Its purpose is not to establish, promote, or advance religion; its purpose is to educate and inform the public about different cultures and increase sensitivity to the beliefs of others. In the words of the policy, its purpose is to "help visitors understand that different cultures perceive resources differently, i.e., some neighboring American Indians regard Rainbow Bridge as sacred," and "generate visitor interest in the cultures and lifestyles, from prehistoric to present times, of the people of the Rainbow Bridge region." (R. at 2068.) This court believes that promoting an understanding of neighboring cultures is an appropriate secular purpose which allows the general public the opportunity to enhance their individual and collective perspective. The purpose is primarily informational. In addition, the policy serves a dual secular purpose of fostering the preservation of the historical, social, and cultural practices of Native Americans. "Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally. Courts have also recognized that 'a variety of motives and purposes are implicated' by government activity in a pluralistic society." *Bauchman,* 132 F.3d at 554 (quoting *Lynch,* 465 U.S. at 680).

Effect

"The effect component . . . should evaluate whether a 'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval." *Id.* at 551-52 (citing *Capital Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 763 (1995)). The United States Supreme Court clearly

"'contemplate[s] that on occasion some advancement of religion will result from governmental action.'" *Id.* at 555 (quoting *Lynch,* 465 U.S. at 683). "The Court has made it abundantly clear . . . that 'not every law that confers an 'indirect,' or 'remote,' or 'incidental' benefit upon [religion] is, for that same reason alone, constitutionally invalid.'" *Lynch,* 465 U.S. at 683 (quoting *Nyquist,* 413 U.S. at 771). However, "[f]or a law to have forbidden 'effects' . . . it must be fair to say that the *government itself*" in the eyes of a reasonable observer, "has advanced religion through its own activities and influence." *Amos,* 483 U.S. at 336. "This is an objective inquiry, not an inquiry into whether particular individuals might be offended by the content of the [1993 GMP and Interpretive Prospectus] or consider [such policies] to endorse religion." *Bauchman,* 132 F.3d at 555. This court believes that a reasonable observer aware of the history and context of the community, would not view the 1993 GMP and Interpretive Prospectus as communicating a message of government endorsement or disapproval. Like its purpose, the effect of the Park Service's policy is informational. Visitors are made aware of the beliefs of others, but are not told that those beliefs are to be preferred over any others, or that the Park Service has adopted traditional religion as its own.

Again, the court notes that the 1993 GMP and Interpretive Prospectus contemplates the public's voluntary compliance with not approaching or walking under Rainbow Bridge. Plaintiff argues, however, that the "voluntary" request is voluntary in name only and its actual effect is to coerce plaintiff "to support or participate in religion or its exercise." *Lee v. Weisman,* 505 U.S. 577, 587 (1992). Specifically, plaintiff asserts that the 1993 GMP and Interpretive Prospectus, because of the social pressure of

complying with the policy, "coerce visitors into conforming to a specific Native American religious practice: that of '*not* passing under the Rainbow God.'" (Reply in Support of Plaintiff's Opening Brief, filed April 12, 2001 (dkt. no. 39), at 17.)

Plaintiff's arguments, by themselves, do not transform the Park Service's voluntary request into a tactic to coerce plaintiff into supporting or participating in Native American religion or its exercise. The policy only asks visitors to consider not walking to or under Rainbow Bridge; it does not, as plaintiff suggests, coerce visitors into practicing the Native American religion associated with the belief about not walking under the Rainbow God. In fact, visitors to Rainbow Bridge have virtually *no* opportunity to observe, let alone participate in the practice of traditional Native American relgions.

Although some visitors may feel social pressure not to walk to or under the bridge, that in no way transforms the voluntary request into a mandatory policy. In fact, there is no officially imposed consequence for choosing to walk to or under the bridge. *See Kerr v. Farley,* 95 F.3d 472 (7th Cir. 1996) (holding that prisoner's "voluntary" alcohol abuse rehabilitation program involving attendance at pseudo-religious meetings violated coercion test of Establishment Clause because prisoner's choice not to attend meetings resulted in higher security risk classification or in negative marks on his prison record); *Santa Fe Indep. Sch. Dist. v. Doe,* 120 S. Ct. 2266 (2000) (striking voluntary prayer program at football games because, among other reasons, attendance was mandatory for many students such as players, band members, and cheerleaders with officially imposed consequences if these students failed to attend). Plaintiff has failed to show how the

voluntary policy is in effect a mandatory policy coercing visitors to support or adopt Native American religion or participate in its exercise.

Excessive Entanglement

To determine whether a given policy constitutes an excessive entanglement the court must look at "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon,* 403 U.S. at 615. While making this determination, this court is mindful that "[e]ntanglement is a question of kind and degree." *Lynch,* 465 U.S. at 668.

Here, the institutions that are benefitted by the 1993 GMP and Interpretive Prospectus are certain Native American tribes. Although Native American tribes are religious in nature, they are also social and cultural institutions, which tends to negate plaintiff's suggestion that because Native American tribes are "primarily religious," the 1993 GMP and Interpretive Prospectus necessarily entangles church and state.

In addition, as plaintiff's opening brief establishes, the 1993 GMP and Interpretive Prospectus implements many policies such as distribution of new signs, website information, and brochures indicating the sanctity of Rainbow Bridge to Native Americans, the Park Service's revegetation efforts, construction of new trails and observation area, and an increased ranger presence at the monument. However, the 1993 GMP and Interpretive Prospectus also contemplate possible modifications to the interpretive plan in case carrying capacity increases over

the years. These policies include ranger presence on tour boats, restricting dock access, and a more intensive interpreter program. However, the only policies in force that can likely be tied to the Park Service's request that the public consider not walking to or underneath the bridge are the distribution of new signs, website information, and brochures and perhaps the increased ranger presence. These activities, by themselves, do not indicate that the Park Service is excessively entangled with religion because of the nature of the aid the Park Service provides. On the other hand, these activities do indicate the very limited nature of the Park Service's involvement in this case. The Park Service is not at all involved in Native American religious practices at Rainbow Bridge – it does not pray or hold ceremonies or interact with said religious practices or tribal members engaging in them. The Park Service only provides a setting more conducive to Native American worship.

Finally, although the Park Service consulted with Native American tribes concerning the social, cultural, and religious importance of Rainbow Bridge, it is incumbent upon the park to do so to fulfill its important trust responsibilities to American Indians. For instance, in 1978, Congress enacted the American Indian Religious Freedom Act creating a government-wide policy

> to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and

> the freedom to worship through ceremonials and traditional rites.[11]

42 U.S.C. § 1996 (1994). Here, the resulting relationship between the Park Service and certain Native American tribes is not of the type which violates the excessive entanglement prong of the *Lemon* test. *See Widmar v. Vincent,* 454 U.S. 263, 272 (1981) (suggesting that entanglement problems occur when government involves itself in invasive monitoring of religion); *see also Board of Educ. of the Westside Cmty Sch. v. Mergens,* 496 U.S. 226, 253 (1990) (holding that Equal Access Act does not excessively entangle church and state because Act's "custodial oversight of the student-initiated religious group, merely to

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[11] Since the 1930s, Congress has passed other federal statutes protecting tribal governments and cultures. *See* Native American Graves and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (requiring federal land managers, including National Park Service, to protect Native American graves, consult with tribes concerning religious and cultural sites and objects, and to repatriate cultural and religious items found on federal lands); National Historical Preservation Act Amendments of 1992, 16 U.S.C. § 470a(d)(6)(A)-(B) (2000) ("Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register."). In addition, in a 1996 Executive Order, the federal government "acknowledge[d] that site-specific worship is vital to Indian religious practices." *Bear Lodge,* 175 F.3d at 817. Interestingly, in the early 1990s, the National Park Service requested that the Utah State Historic Preservation Officer ("USHPO") make a determination of eligibility of Rainbow Bridge for the National Register of Historic Places as a site that has cultural significance based on its traditional and sacred values to Native Americans. (R. at 2036.) On March 17, 1992, the USHPO concurred with the recommendation that Rainbow Bridge is eligible for listing. (*Id.*) In the Executive Order, federal agencies are required to: "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid aversely affecting the physical integrity of such sacred sites." *Id.* (citing Exec. Order No. 13,007, 61 Fed.Reg. 26,771 (1996)).

ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities").

Based on the foregoing,

IT IS ORDERED that the defendants' motion to dismiss is GRANTED as to plaintiffs Moore, Brandt-Ericson, Leake, Johnson, and Natural Arch and Bridge Society for lack of standing, and DENIED as to plaintiff DeWaal; defendants' motion to dismiss for failure to state a claim is GRANTED as to plaintiff DeWaal's equal protection claim;

IT IS FURTHER ORDERED that plaintiff DeWaal's motion for summary judgment is DENIED as to his challenge to the 1993 GMP and Interpretive Prospectus under the Administrative Procedure Act and his claim is dismissed on the merits; plaintiff DeWaal's motion for summary judgment is DENIED as to his claim involving alleged violation of the First Amendment by employees of the National Park Service for failure to join the proper parties as defendants.

Let Judgment be entered accordingly.

DATED this 1st day of July, 2002, entered nunc pro tunc to 5th of April 2002.

BY THE COURT

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
United States Senior
District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NATURAL ARCH AND BRIDGE SOCIETY, a Colorado non-profit corporation, et al.,

Plaintiffs-Appellants,

v.

JOSEPH A. ALSTON, Superintendent, Rainbow Bridge National Monument, et al.,

Defendants-Appellees.

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH AMERICA, AND NATIONAL TRUST FOR HISTORIC PRESERVATION,

Amicus Curiae.

No. 02-4099

ORDER

Filed May 17, 2004

Before **LUCERO**, **McWILLIAMS**, **O'BRIEN**, Circuit Judges.

Appellees' shall file a response to the appellants' petition for rehearing en banc on or before June 1, 2004.

Entered for the Court,
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS

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Plaintiffs-Appellants,

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Amicus Curiae.

No. 02-4099

ORDER

Filed June 15, 2004

Before **LUCERO**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **O'BRIEN**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

No. 04-367

In the Supreme Court of the United States

EARL DEWAAL, PETITIONER

v.

JOSEPH F. ALSTON, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner has standing to challenge a National Park Service policy of requesting that visitors voluntarily refrain from walking around or under a natural rock structure due to its religious and cultural significance to Native Americans.

2. Whether a National Park Service policy of requesting that visitors voluntarily refrain from walking around or under a natural rock structure due to its religious and cultural significance to Native Americans violates the Establishment Clause.

TABLE OF CONTENTS

Page

Opinions Below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Cases:

ACLU v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) 7
Allen v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) 7
Anderson v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), cert. denied, 414 U.S. 879 (1973) 7
Bear Lodge Multiple Use Ass'n v. *Babbitt*, 175 F.3d 814 (10th Cir. 1999), cert. denied, 529 U.S. 1037 (2000) 5, 9
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 4
Buono v. *Norton*, 371 F.3d 543 (9th Cir. 2004) 7
City of Edmond v. *Robinson*, 517 U.S. 1201 (1996) ... 8
Foremaster v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990) ... 7
Hawley v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), cert. denied, 475 U.S. 1047 (1986) 7
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 5, 6
Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 10
Morton v. *Mancari*, 417 U.S. 535 (1974) 8, 10

Cases—Continued: Page

Saladin v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) 7

Suhre v. *Haywood County*, 131 F.3d 1083 (4th Cir. 1997) 7, 8

United States v. *SCRAP*, 412 U.S. 669 (1973) 6

Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 9

Zelman v. *Simmons-Harris*, 536 U.S. 639 (2002) 9

Zorach v. *Clauson*, 343 U.S. 306 (1952) 10

Constitution and statute:

U.S. Const.:

Art. III 6, 8

Amend. I (Establishment Clause) 4, 9, 10

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* ... 3

In the Supreme Court of the United States

No. 04-367

EARL DEWAAL, PETITIONER

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JOSEPH F. ALSTON, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter, but is *reprinted in* 98 Fed. Appx. 711. The opinion of the district court (Pet. App. 13-50) is reported at 209 F. Supp. 2d 1207.

JURISDICTION

The court of appeals entered its judgment on March 23, 2004. A petition for rehearing was denied on June 15, 2004 (Pet. App. 53-54). The petition for a writ of certiorari was filed on September 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Located in Southern Utah, Rainbow Bridge is the largest, naturally formed bridge in the world. Pet. App. 14. In 1910, President William Taft declared the Rainbow Bridge rock formation to be a national monument. *Id.* at 17. Rainbow Bridge, which is largely surrounded by the Navajo Reservation, has religious and cultural significance for a variety of Indian Tribes, including the Navajo, Hopi, San Juan Paiute, and Pueblo Tribes. *Id.* at 16-17, 19.

Prior to the federal government's completion of the nearby Glen Canyon Dam and the Glen Canyon Recreation Area, access to Rainbow Bridge was difficult, and visitor numbers were low. Pet. App. 19. But the creation of Lake Powell behind Glen Canyon Dam provided easy boat access to the Monument, causing the number of visitors to skyrocket from around 1000 in 1955 to 346,000 in 1995. *Ibid.* That dramatic increase created a variety of problems for the Monument, including erosion, damage to natural vegetation, rock graffiti, litter, noise pollution, and vandalism. *Id.* at 21.

Over the course of nearly ten years, the National Park Service met with interested groups and devised a management plan for the Rainbow Bridge site. Pet. App. 21, 23. The Park Service published the final General Management Plan (Plan) in June 1993. *Id.* at 23-24. To protect the physical integrity of Rainbow Bridge and the surrounding area, the Plan contemplates the funneling of visitors onto hardened trails and viewing areas having low resource impacts, and the closure of eroded areas to traffic so that native species can be reestablished. *Id.* at 24. The Plan also acknowledges the concerns of neighboring Indian Tribes

and contemplates a program by which visitors are made aware that members of those Tribes view the Bridge as a sacred site. *Ibid.* The purpose of that notice is both to "help visitors understand that different cultures perceive resources differently, i.e., some neighboring American Indians regard Rainbow Bridge as sacred," and to "generate visitor interest in the cultures and lifestyles, from prehistoric to present times, of the people of the Rainbow Bridge region." *Id.* at 25. Under the Plan, small wayside signs and a brochure note the Bridge's significance to Native Americans and request that visitors respect longstanding Native American beliefs by voluntarily refraining from approaching or walking under Rainbow Bridge. *Id.* at 5, 25. However, nothing in the Plan prohibits visitors from approaching or walking underneath Rainbow Bridge. In fact, many visitors continue to approach and walk under the Bridge. *Id.* at 8.[1]

2. Petitioner filed suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, against the Superintendent of Rainbow National Monument, the Director of the National Park Service, and the National Park Service seeking declaratory and injunctive relief halting implementation of the Plan "as it relates to the Park Service's policy to request that the public respect cultural differences by voluntarily not walking underneath Rainbow Bridge." Pet. App. 25.[2] The complaint alleges

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[1] Contrary to petitioner's formulation of the questions presented, see Pet. i, nothing in the Plan "requires all visitors to [the] national monument to be instructed that an area of the monument is a 'sacred religious site' to some American Indians and that all visitors must show 'respect' for that religion."

[2] A number of other individuals and an organization also filed suit, but their cases were dismissed below, see Pet. App. 4, 27-35, and none

that the policy of requesting that visitors refrain from walking under the Bridge violates the Establishment Clause of the First Amendment of the Constitution. In the complaint, petitioner alleges that he visited the Monument and felt compelled not to walk under the Bridge because of signs and a statement by a Park Ranger asking him voluntarily to refrain from walking underneath Rainbow Bridge. *Id.* at 7, 32-33.[3]

The district court dismissed the complaint. Pet. App. 13-50. The court first held that petitioner had standing to pursue his Establishment Clause claim based on "the Park Service's request for voluntary compliance in not approaching or walking underneath Rainbow Bridge." *Id.* at 34. On the merits, the district court ruled that the Plan and the Park Service's implementation of the Plan did not violate the Establishment Clause. The court found that "promoting an understanding of neighboring cultures is an appropriate secular purpose," and that "[t]he purpose is primarily informational" and would not be viewed by a reasonable observer as endorsing Indian religion. *Id.* at 44-45. The court stressed that the Park

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of them joins in the petition for a writ of certiorari or seeks this Court's review of the dismissal of their claims.

[3] The complaint refers to an incident in 1999 when Park Rangers allegedly told petitioner that he would be cited if he walked beneath Rainbow Bridge. See Pet. 5. The district court dismissed that claim from this Administrative Procedure Act lawsuit because it pertained to the conduct of individual Park Rangers who were not named as defendants. The district court held that any claim arising out of the 1999 incident would have to proceed under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 32. Petitioner did not challenge that ruling by the district court on appeal, nor did he raise that issue in his petition to this Court. The district court found standing based on a separate visit in 1998 that was discussed during discovery in the case. See *id.* at 7.

Service policy "only asks visitors to consider not walking to or under Rainbow Bridge; it does not, as plaintiff suggests, coerce visitors into practicing the Native American religion associated with the belief about not walking under the Rainbow God." *Id.* at 46.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1-12. The court ruled that petitioner lacked standing, and thus did not address the merits of the complaint. The court held that the mere request that petitioner voluntarily refrain from approaching or walking underneath the Bridge invaded no legally protected interest of petitioner's and inflicted no injury because he remained free at all times to walk under Rainbow Bridge. *Id.* at 10-12 (citing *Bear Lodge Multiple Use Ass'n* v. *Babbitt*, 175 F.3d 814 (10th Cir. 1999), cert. denied, 529 U.S. 1037 (2000)).

ARGUMENT

1. The court of appeals' unpublished decision holding that petitioner lacks standing does not merit this Court's review. This Court held in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that the "irreducible constitutional minimum of standing" requires that the plaintiff (1) "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision." *Id.* at 560-561 (internal quotation marks and citation omitted). Absent the concrete invasion of a legally protected interest, federal courts cannot vindicate "the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973). Instead, plaintiffs must make "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566.

The decision below reflects a straightforward application of the test for standing established in *Lujan*. The court of appeals applied the correct legal standard to the record in this case and concluded that a simple governmental request to refrain from certain activity while a visitor on property owned and managed by the federal government—a request that petitioner was free to disregard without sanction, and that numerous visitors did disregard without consequence, Pet. App. 8—does not constitute the invasion of any legally protected interest. See *id.* at 10-12; see also *Bear Lodge Multiple Use Ass'n* v. *Babbitt*, 175 F.3d 814, 821-822 (10th Cir. 1999) (applying *Lujan* to similar policy requesting that visitors refrain from rock climbing at Devil's Tower during the month of June out of respect for Native American religious beliefs), cert. denied, 529 U.S. 1037 (2000). Petitioner's record-bound disagreement with the application of settled law to the facts of his case does not merit further review by this Court.

Petitioner's contention (Pet. 6-13) that the court of appeals' decision conflicts with the rulings of other courts is incorrect. First, almost all of the court of appeals' standing cases cited by petitioner (see Pet. 6-7) predate this Court's decision clarifying the standard for Article III standing in *Lujan*.

Second, the decision below, in fact, does not conflict with the decision of any other court of appeals. All of

the court of appeals cases cited by petitioner involved governmental displays of sectarian religious symbols on government property. See *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004) (cross posted on federal land); *Suhre* v. *Haywood County*, 131 F.3d 1083 (4th Cir. 1997) (courtroom display of the Ten Commandments); *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (inclusion of image of Mormon temple in city logo), cert. denied, 495 U.S. 910 (1990); *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (city seal containing the word "Christianity"); *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (chapel in airport), cert. denied, 475 U.S. 1047 (1986); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (large lighted cross in state park); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.) (courthouse display of the Ten Commandments), cert. denied, 414 U.S. 879 (1973); *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (creche in federal park).

This case does not involve the display of any religious item or symbol on government property. Rainbow Bridge is not a governmental display of a religious symbol on property; it is property in its natural state. Rainbow Bridge is a natural rock formation of undeniable secular interest and value. Petitioner does not challenge the constitutionality of the government's designation of Rainbow Bridge as a national monument or the government's decision to open the Rainbow Bridge Monument to public viewing. Nor does petitioner claim that he has been exposed to any Native American religious practices at Rainbow Bridge. Indeed, the gist of petitioner's complaint is that he desires closer contact with Rainbow Bridge; not that the government has erected a display or exposed him to

religious symbols or rituals that he wishes to avoid. Compare *City of Edmond* v. *Robinson*, 517 U.S. 1201, 1201-1203 (1996) (Rehnquist, C.J., & Scalia & Thomas, JJ., dissenting from the denial of certiorari) (discussing conflict in the circuits on Article III standing to challenge "expos[ure] to a state symbol that offends his beliefs"). This case thus provides no opportunity for the Court to address the question of Article III standing to challenge sectarian displays on government property.[4]

The issue presented in this case is distinct and much narrower—whether hearing or reading a governmental request to conduct oneself, while a visitor on federal property, in a manner that is respectful of the religious and cultural beliefs of Indian Tribes for which the federal government has a unique trust responsibility, see *Morton* v. *Mancari*, 417 U.S. 535 (1974)—invades a cognizable, legally protected interest. Not one of the decisions from the other courts of appeals cited by petitioner presented, raised, or decided that question. There thus is no conflict in the circuits warranting this

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[4] In addition, most of the cases petitioner cites, unlike the case at hand, involved religious displays in the plaintiff's home community.

> The circuits have thus recognized that "[t]he practices of our own community may create a larger psychological wound than someplace we are just passing through." *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679, 683 (6th Cir. 1994). Plaintiffs who "are part of the [community where challenged religious symbolism is located] and are directly affronted by the presence of [this symbolism]" certainly "have more than an abstract interest in seeing that [the government] observes the Constitution." *Saladin*, 812 F.2d at 693. Thus, where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie.

Suhre, 131 F.3d at 1087.

Court's review. Indeed, the petition mirrors the arguments advanced in the petition for a writ of certiorari in *Bear Lodge*, *supra*, in which this Court denied review. See 529 U.S. 1037 (2000).

The court of appeals' decision, moreover, is correct. Petitioner's offense at the government's non-obligatory request is not sufficient to establish standing. The "psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under [Article] III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982). No legally protected interest of petitioner's was impaired. He remained free at all times to view, visit, approach, and walk under Rainbow Bridge. Petitioner was neither "subjected to unwelcome religious exercises" at Rainbow Bridge, nor was he "forced to assume special burdens to avoid them." *Id.* at 486 n.22. While petitioner ultimately did not approach Rainbow Bridge, that was a consequence of his own intervening, "genuine and independent private choice," after being provided with information concerning the religious and cultural views of others. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002). The alleged injury thus arose "as a consequence" of petitioner's own decisionmaking. *Valley Forge*, 454 U.S. at 485 (emphasis omitted).

2. Petitioner's Establishment Clause challenge (Pet. 13-22) to the governmental policy of requesting that visitors refrain from approaching Rainbow Bridge does not merit this Court's review. The court of appeals did not address the Establishment Clause question, so it is not properly positioned for this Court's review.

Furthermore, no other court of appeals has addressed whether such voluntary requests of visitors to federal land violate the Establishment Clause. There thus is no conflict in the circuits that necessitates this Court's review at this time.

In fact, the policy fully comports with this Court's precedent. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court upheld against an Establishment Clause challenge a program of releasing students early from public elementary school classes so that they could attend independently sponsored religion classes. In so holding, the Court explained that government "follows the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 314. The Establishment Clause does not require government to operate its programs with "callous indifference to religious groups," for "[t]hat would be preferring those who believe in no religion over those who do believe." *Ibid.* Moreover, the government's longstanding trust responsibility for Indian Tribes makes this type of measured and calibrated accommodation of the religious needs of sovereign Tribes on land that historically belonged to them particularly appropriate. See *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988) ("The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."); see generally *Morton* v. *Mancari*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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No. 04-367

In The
Supreme Court of the United States

EARL DeWAAL,

Petitioner,

v.

JOSEPH F. ALSTON, Superintendent, Rainbow Bridge National Monument; ROBERT G. STANTON, Director, National Park Service; and the NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. PETITIONER HAS STANDING TO CHALLENGE ENDORSEMENT OF A RELIGIOUS SYMBOL 1

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF OTHER CIRCUITS BECAUSE THIS CASE INVOLVES A RELIGIOUS SYMBOL ON GOVERNMENT PROPERTY 3

III. PETITIONER'S ESTABLISHMENT CLAUSE CHALLENGE MERITS REVIEW BY THIS COURT 4

IV. TWO CASES NOW BEFORE THIS COURT ADDRESS THE SAME ISSUES AS PRESENTED BY THIS CASE 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 4

ACLU of KY, et al., v. McCreary County, et al., 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 346 (2004) 6, 7

Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) 3

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 1

DeWaal v. Alston, 98 Fed.Appx. 711 (10th Cir. 2004) 1, 7

Freedom From Religion v. Zielke, 845 F.2d 1463 (7th Cir. 1988) 1

Lee v. Weisman, 505 U.S. 577 (1992) 3

Lemon v. Kurtzman, 403 U.S. 602 (1971) 4

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 2

Natural Arch and Bridge Society v. Alston, 209 F.Supp.2d 1207 (D.Utah 2002) 1

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 6

Suhre v. Haywood County, 131 F.3d 1083 (4th Cir. 1997) 1, 3

Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (2004) 6, 7

Zorach v. Clauson, 343 U.S. 306 (1952) 4

ARGUMENT

I. PETITIONER HAS STANDING TO CHALLENGE ENDORSEMENT OF A RELIGIOUS SYMBOL.

The Tenth Circuit's decision holding that Mr. DeWaal lacks standing merits this Court's review. Petition for *Writ* of *Certiorari* ("Petition"), 3. This Court has held that Establishment Clause plaintiffs have standing when governments endorse religious symbols in public places, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). *Id.* at 13. Five Circuit Courts of Appeals have held that Establishment Clause plaintiffs have standing when they come into direct personal contact with offensive government endorsement of religious symbols in public places, *e.g.*, *Suhre v. Haywood County,* 131 F.3d 1083 (4th Cir. 1997). Petition, 14. Three Circuits have held that Establishment Clause plaintiffs have standing when they alter their behavior as a result of government endorsement of religious symbols in public places, *e.g.*, *Freedom From Religion v. Zielke*, 845 F.2d 1463 (7th Cir. 1988). Petition, 15.

Nonetheless, the Tenth Circuit held, in *DeWaal v. Alston*, 98 Fed.Appx. 711 (10th Cir. 2004), that Mr. DeWaal lacked standing even though it acknowledged that Mr. DeWaal had come into direct personal contact with the National Park Service's ("NPS") treatment of Rainbow Bridge as god incarnate and its policy that visitors should not approach the "Rainbow God." *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207, 1225 (D.Utah 2002). The Tenth Circuit's ruling conflicts with the holdings of this Court and those of all Circuits that have ruled on who has standing to chal'enge government endorsement of a religious symbol in a public place. Moreover, this Court has made it clear that federal land may not be closed to

the public for purposes of religious activity. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Similarly, in this case, the federal government may not "exclude human activity" simply because some American Indians consider Rainbow Bridge sacred. This petition should be granted to resolve this conflict.

Respondents incorrectly claim that Mr. DeWaal did not approach Rainbow Bridge as a consequence of his own intervening "genuine and independent private choice." Brief for the Respondents in Opposition ("Opposition"), 9. Instead, Mr. DeWaal did not approach Rainbow Bridge because: (1) he was distinctly told not to by a uniformed NPS Interpreter/Ranger, App. 7, 30-31; and (2) he was threatened with a citation by the Supervising NPS Ranger if he did so. App. 5-7, 33. As a direct consequence of these official communications, Mr. DeWaal "felt compelled" not to approach or walk beneath Rainbow Bridge, although he wanted to do so. App. 6-7, 33. Therefore, Mr. DeWaal's decision was not his "choice". As a result, under the holdings of this Court and three of the Circuits, Mr. DeWaal has standing. The contrary decision of the Tenth Circuit conflicts with those holdings.

Furthermore, assuming *arguendo* that Mr. DeWaal did not "alter his behavior," nevertheless Mr. DeWaal did come into direct personal contact with government endorsement of a religious symbol in a public place. As a result, under the holdings of this Court and five of the Circuits, Mr. DeWaal has standing. The contrary decision of the Tenth Circuit conflicts with those holdings.

Finally, contrary to Respondents' assertions, the demand by the NPS that Mr. DeWaal alter his conduct was not a "simple governmental request to refrain from a

certain activity," Opposition, 6, but rather "an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF OTHER CIRCUITS BECAUSE THIS CASE INVOLVES A RELIGIOUS SYMBOL ON GOVERNMENT PROPERTY.

Respondents contend that the Tenth Circuit's decision does not conflict with the decision of any other Circuit because the cases cited by Mr. DeWaal involved "governmental displays of sectarian religious symbols on government property." Opposition, 7. Respondents incorrectly claim that this case does not involve any religious item or symbol. Although Respondents are correct that Rainbow Bridge is a natural geological formation, American Indians believe it is God incarnate. In deference to that belief the NPS has gone to great lengths to ensure that visitors show the proper "respect" for this American Indian belief and in turn, alter their behavior. *See* Rainbow Bridge National Monument June 1993 General Management Plan.

In the cases cited by Mr. DeWaal, Respondents object not to the particular symbol or words, but instead to the religious significance of those symbols or words. Both *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997), and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), involve challenges to placement of the Ten Commandments in a public place. Although the Ten Commandments are just words carved in stone, Christians and Jews believe that the Ten Commandments came directly from God. It is this belief, and the government's endorsement of it, that makes placement of a protrayal of

the Ten Commandments in a public place a violation of the Establishment Clause.

At Rainbow Bridge it is not the geological formation to which Mr. DeWaal objects, it is instead the endorsement by the NPS of its religious significance to American Indians that he finds constitutionally offensive. The NPS did not "display" Rainbow Bridge, it is, of course, a naturally occurring geological formation. However, like the government in the cases cited by Mr. DeWaal, the NPS is endorsing the religious significance of that physical form, thereby violating the Establishment Clause. The Tenth Circuit's failure to so rule conflicts with the decision of other Circuits that have banned endorsement of religious symbols in public places.

III. PETITIONER'S ESTABLISHMENT CLAUSE CHALLENGE MERITS REVIEW BY THIS COURT.

Respondents incorrectly cite to *Zorach v. Clauson*, 343 U.S. 306 (1952) when claiming that Mr. DeWaal's challenge does not involve a violation of the Establishment Clause. Opposition, 10. The correct test, as determined by this Court more than thirty years ago, is set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): Under *Lemon*, the Establishment Clause requires that any government practice that touches upon religion must: (i) have a secular purpose; (ii) neither advance nor inhibit religion in principal or primary effect; and (iii) avoid excessive entanglement with religion. *Id.* at 612-613. Further, "[t]he state may not adopt programs of practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

First, the practices adopted by the NPS at Rainbow Bridge aid the religious beliefs of American Indians. From the adoption of the 1993 General Management Plan and the placement of official NPS signs identifying Rainbow Bridge as a "sacred" site and directing visitors to act in a specified manner to providing visitors with interpretive speeches pertaining to the spiritual and religious values of the site, the NPS's support for American Indian religion is obvious. Petition, 4-5. Because these practices not only touch upon religion, but were adopted solely for the purpose of protecting the American Indian religion, they do not have a secular purpose.

Second, the "principal [and] primary effect" of the NPS's actions is to advance religion. The NPS admits that the "actual purpose" of its policy is to promote "respect" for the religious beliefs of American Indians about Rainbow Bridge. It candidly admits, for example, that its policy is to manage the Rainbow Bridge "as a traditional cultural property" in response to American Indian beliefs about the "religious significance of the site."[1] *See* Rainbow Bridge National Monument June 1993 General Management Plan, Development Concept Plan Interpretive Prospectus, 1993. Furthermore, the NPS declares that "[p]eople walking beneath the bridge is [sic] particularly offensive to the Navajo people and other American Indian tribal members" and "[i]nappropriate visitor use of the site

[1] The 1993 GMP also mandated the creation of a "visitor-use monitoring" program to ensure the effectiveness of the NPS's efforts to "discourage use below the bridge" due to "the significance of the bridge to American Indians. . . ." Rainbow Bridge National Monument June 1993 General Management Plan. Development Concept Plan Interpretive Prospectus, 1993. At the time the Complaint was filed, the monitoring program had not yet been implemented.

creates an atmosphere that detracts . . . from the American Indian view of how the site should be treated . . . ." *Id.* at 6, 8. As a result, the NPS determined that "the religious and sacred significance of the area to various American Indian tribes" is "a strong factor in determining the way the [Rainbow Bridge] is managed." *Id.* at 1.

Last, the NPS has failed to avoid excessive entanglement with religion; its actions, in fact, foster and promote American Indian religion. The "central lesson" of this Court's Establishment Clause jurisprudence is that the government must maintain "neutrality towards religion." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 845 (1995). At Rainbow Bridge, the NPS has failed to maintain neutrality; instead, it endorses the sacred nature of Rainbow Bridge and demands that visitors "respect" that belief by not approaching the "Rainbow God."

As a result of its actions, the NPS has violated the Establishment Clause.

IV. TWO CASES NOW BEFORE THIS COURT ADDRESS THE SAME ISSUES AS PRESENTED BY THIS CASE.

Two cases now before this Court for a determination of their merits speak to the very issue that Mr. DeWaal asks the Court to address in his petition. *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (2004); *ACLU of KY, et al., v. McCreary County, et al.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 346 (2004). The factual question in these two cases is whether the display in a public place of a monument that includes the Ten Commandments, which Jews and Christians

believe were written in stone by God, constitutes unconstitutional government endorsement of religion. In Mr. DeWaal's case, the question is whether the government's endorsement of the religious beliefs of some American Indians that a geological feature is god incarnate or the "Rainbow God" is unconstitutional. Neither the monuments in *Van Orden* or *McCreary County*, nor the geological feature in *DeWaal* are, in and of themselves, offensive to the Constitution; however, when a government endorses the significance affixed by religious adherents to any of these pieces of stone, that government runs afoul of the Establishment Clause.

This Court may find, from the facts of *Van Orden* and *McCreary County*, that in those cases the government has not endorsed the religious significance – to Jews and Christians – of those stone monuments, neither opining as to what Judeo-Christian orthodoxy believes nor attempting to enforce that orthodoxy. Such a finding is impossible in the instant case, however, because the NPS not only aggressively espouses and endorses the view of some American Indians that Rainbow Bridge is god incarnate, it enforces that orthodoxy by commanding that visitors show "respect" for the "Rainbow God."

Given that the question in the instant case is the same as that presented in both *Van Orden* and *McCreary County*, this Court should hold Mr. DeWaal's petition aside until those cases are decided. At that time, certiorari should be granted in Mr. DeWaal's case and the case should be reviewed and remanded to the Tenth Circuit with instructions to follow the Court's rulings in *Van Orden* and *McCreary*.

CONCLUSION

For the foregoing reasons, the Petition for *Writ of Certiorari* should be granted.

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